(2)

DEC 16

No. 04-5293

In The
Supreme Court of the United States

CARMAN DECK,

Petitioner,

v.

STATE OF MISSOURI,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Missouri

JOINT APPENDIX

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Petition For Certiorari Filed July 15, 2004
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RELEVANT DOCKET ENTRIES

July 9, 1996	Charges filed against Deck in the Circuit Court of Jefferson County, Missouri, Case No. CR196-1084.
February 17, 1998	Court orders that Deck will be restrained in leg braces for trial.
February 18, 1998	Trial commences.
February 20, 1998	Deck is found guilty of all counts.
February 21, 1998	Jury recommends that Deck be sentenced to death.
April 27, 1998	Court imposes two death sentences.
April 30, 1998	Deck files Notice of Appeal.
June 1, 1999	Missouri Supreme Court affirms sentences and convictions.
September 27, 1999	Deck files a motion for postconviction relief in the Circuit Court of Jefferson County.
October 17, 2000	Circuit Court hears evidence (through in-court and deposition testimony) on claims for postconviction relief.
November 1, 2000	Circuit Court denies motion for postconviction relief.
February 26, 2002	Missouri Supreme Court reverses Circuit Court's denial of postconviction relief and remands for a new penalty phase.
April 29, 2003	Penalty phase retrial commences.
April 29, 2003	Deck files "Motion to Have Accused Appear at Trial Free of Restraints."

May 1, 2003	Jury recommends that Deck be sentenced to death.
May 27, 2003	Deck files a motion for new trial.
June 30, 2003	Circuit Court denies motion for new trial and imposes two death sentences.
July 10, 2003	Deck files Notice of Appeal.
May 25, 2004	Missouri Supreme Court affirms death sentences.
July 15, 2004	Petition for Writ of Certiorari filed.
October 18, 2004	Certiorari granted.

23RD JUDICIAL CIRCUIT

Date 2/23/98

DOCKET SHEET FOR CR196-1084

ST VS: DECK, CARMEN L

* * *

1/10/97 ATTORNEY FOR THE DEFENDANT FILES MOTION FOR A PSYCHOLOGICAL ASSESSMENT PRUSUANT [sic] TO SECTION 552.020 RSMO TO BE PERFORMED BY ROSALYN SCHULTZ PH.D.
DEFENDANT FILES ORDER TO ADMIT PSYCHOLOGIST ROSALYN SCHULTZ PH.D. INTO THE JAIL TO CONDUCT A PSYCHOLOGICAL EVALUATION OF INMATE CARMEN DECK JR.
DEFENDANT FILES NOTICE AND REQUEST THE MOTION FOR PSYCHOLOGICAL ASSESSMENT BE CALLED ON JANUARY 13, 1997 AT 9:00 AM.
----------Nancee Bourisaw--

* * *

1/31/97 COPY OF CORRESPONDENCE FROM PUBLIC DEFENDER TO COURT.
ATTORNEY FOR THE DEFENDANT FILES MOTION FOR A PSYCHOLOGICAL ASSESSMENT PURSUANT TO SECTION 552.020 RSMO TO BE PERFORMED BY ROSALN [sic] SCHULTZ PHD.
COURT FILES ORDER FOR THE JAIL TO ADMIT PSYCHOLOGIST ROSALYN SCHULTZ PFD INTO THE JAIL FOR THE PURPOSE OF CONDUCTION [sic] A PSYCHOLOGICAL EVALUATION FOR CARMEN DECK JR.
----------Nancee Bourisaw--

* * *

3/10/97 ROSALYN SCHULTZ, PH.D., FILES PSYCHOLOGICAL EXAMINATION
----------Kelly Noeth--

* * *

Office of Circuit Clerk

HOWARD WAGNER

State of Missouri — Div. No. 2

VS

Carmen Deck

In the CIRCUIT COURT JEFFERSON COUNTY, MISSOURI

Docket No.

Case No. CR196-1084-FX-J2 — February 17 19 98

MEMORANDUM

6 or 12 JURORS — COURT REPORTER
WITNESS OATH — APPT. AD. LITEM ATTY.

Comes now the Court and orders the Defendant to be restrained in leg braces and dressed in civilian clothes.

SO ORDERED: /s/ Gary P. Kramer
CIRCUIT JUDGE, DIVISION TWO

188

SO ORDERED:

PLF. ATTORNEY — **DEF. ATTORNEY**

994 S.W.2d 527

Supreme Court of Missouri,
En Banc.

STATE of Missouri, Respondent,
v.
Carmen L. **DECK**, Appellant.

No. 80821.

June 1, 1999.
Rehearing Denied June 29, 1999.

Deborah B. Wafer, St. Louis, for Appellant.

Jeremiah W. (Jay) Nixon, Atty. General, Catherine Chatman, Assistant Attorney General, Jefferson City, for Respondent.

STEPHEN N. LIMBAUGH, Jr., Judge.

A Jefferson County jury convicted **Carmen** L. **Deck**, Jr., of two counts of first degree murder, two counts of armed criminal action, one count of first degree robbery, and one count of first degree burglary. Deck was sentenced to death for each of the two murder counts and concurrent life sentences for the two counts of armed criminal action, as well as consecutive sentences of thirty years imprisonment for the robbery count and fifteen years imprisonment for the burglary count. This Court has jurisdiction of the appeal because the death sentence was imposed. Mo. Const. art. V, sec. 3. The judgment is affirmed.

I. Facts

Viewed in the light most favorable to the verdict, *State v. Rousan,* 961 S.W.2d 831 (Mo. banc), *cert. denied,* 524 U.S. 961, 118 S.Ct. 2387, 141 L.Ed.2d 753 (1998), the facts

are as follows: In June 1996, Deck planned a burglary with his mother's boyfriend, Jim Boliek, to help Boliek obtain money for a trip to Oklahoma. Deck targeted James and Zelma Long, the victims in this case, because he had known the Longs' grandson and had accompanied him to the Longs' home in DeSoto, Missouri, where the grandson had stolen money from a safe. The original plan was to break into the Longs' home on a Sunday while the Longs were at church. In preparation for the burglary, Deck and Boliek drove to DeSoto several times to canvass the area.

On Monday, July 8, 1996, Boliek told Deck that he and Deck's mother wanted to leave for Oklahoma on Friday, and he gave Deck his .22 caliber High Standard automatic loading pistol. That Monday evening, Deck and his sister, Tonia Cummings, drove in her car to rural Jefferson County, near DeSoto, and parked on a back road, waiting for nightfall. Around nine o'clock, Deck and Cummings pulled into the Longs' driveway.

Deck and Cummings knocked on the door and Zelma Long answered. Deck asked for directions to Laguana Palma, whereupon Mrs. Long invited them into the house. As she explained the directions and as Mr. Long wrote them down, Deck walked toward the front door and pulled the pistol from his waistband. He then turned around and ordered the Longs to go lie face down on their bed, and they complied without a struggle.

Next, Deck told Mr. Long to open the safe, but because he did not know the combination, Mrs. Long opened it instead. She gave Deck the papers and jewelry inside and then told Deck she had two hundred dollars in her purse in the kitchen. Deck sent her into the kitchen and she brought the money back to him. Mr. Long then told Deck

that a canister on top of the television contained money, so Deck took the canister, as well. Hoping to avoid harm, Mr. Long even offered to write a check.

Deck again ordered the Longs to lie on their stomachs on the bed, with their faces to the side. For ten minutes or so, while the Longs begged for their lives, Deck stood at the foot of the bed trying to decide what to do. Cummings, who had been a lookout at the front door, decided time was running short and ran out the door to the car. Deck put the gun to Mr. Long's head and fired twice into his temple, just above his ear and just behind his forehead. Then Deck put the gun to Mrs. Long's head and shot her twice, once in the back of the head and once above the ear. Both of the Longs died from the gunshots.

After the shooting, Deck grabbed the money and left the house. While fleeing in the car, Cummings complained of stomach pains, so Deck took her to Jefferson Memorial Hospital, where she was admitted. Deck gave her about two hundred fifty dollars of the Long's money and then drove back to St. Louis County. Based on a tip from an informant earlier that same day, St. Louis County Police Officer Vince Wood was dispatched to the apartment complex where Deck and Cummings lived. Officer Wood confronted Deck late that night after he observed him driving the car into the apartment parking lot with the headlights turned off. During a search for weapons, Officer Wood found a pistol concealed under the front seat of the car and, then, placed Deck under arrest. Deck later gave a full account of the murders in oral, written and audiotaped statements.

II. Motion for Change of Venue

Deck first contends that the trial court erred in overruling his motion for change of venue filed under Rule 32.04. As grounds for the motion, he stated that "the case ha[d] received extensive publicity by way of newspaper and television coverage" and that "[t]he residents of Jefferson County [were] biased and prejudiced against defendant and defendant [could] not receive a fair trial." The trial court overruled the motion after an evidentiary hearing, finding that there was not "such overwhelming pre-trial publicity as is likely to render impossible the selection of an impartial jury." Deck now claims that the trial court's error violated his rights to due process of law, trial by fair and impartial jury, reliable sentencing, and freedom from cruel and unusual punishment as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and article I, sections 10, 18(a), and 21 of the Missouri Constitution.

A change of venue is required when it is necessary to assure the defendant a fair and impartial trial. *State v. Kinder,* 942 S.W.2d 313, 323 (Mo. banc 1996). The decision to grant or deny a request for change of venue for cause rests within the trial court's discretion, *State v. Feltrop,* 803 S.W.2d 1, 6 (Mo. banc 1991), and the trial court's ruling will not be reversed absent a clear showing of abuse of discretion and a real probability of injury to the complaining party. *Id.* A trial court abuses its discretion, however, when the record shows that the inhabitants of the county are so prejudiced against the defendant that a fair trial cannot occur there. *Id.; Kinder,* 942 S.W.2d at 323. In reviewing the trial court's ruling, it is understood that the trial court, rather than the appellate court, is in the better position to assess the effect of publicity on the

members of the community. *Feltrop*, 803 S.W.2d at 6. Finally, in assessing the impact of potentially prejudicial publicity on prospective jurors, the critical question is not whether they remember the case, but whether they have such fixed opinions regarding the case that they could not impartially determine the guilt or innocence of the defendant. *Id.*

At the hearing on the motion, Deck introduced into evidence nine newspaper articles and several videotapes of television news broadcasts, all of which appeared within a few weeks of the July 8 murders. In addition, Deck offered the testimony of Dr. Kenneth Warren, a professor of political science at Saint Louis University, who was commissioned to conduct an opinion poll to determine the extent to which residents of Jefferson County had heard of the case. Dr. Warren's poll, which was taken between November 13, 1996 and December 9, 1996, more than a year before trial, consisted of a survey of five hundred eighteen residents of Jefferson County. The results showed that sixty-nine percent of the people polled were aware of the case and twenty-seven percent held an opinion regarding Deck's guilt. These circumstances, Deck maintains, demonstrate that the Jefferson County community was saturated with publicity about the case that was prejudicial to him, and thus the trial court abused its discretion in overruling his motion for change of venue.

To reinforce his position, Deck also notes that during jury selection, fifty of the prospective jurors indicated that they had heard about or read about the case. Thirteen of the fifty stated that they had formed opinions regarding Deck's guilt based on the publicity and that it would be difficult or impossible for them to render a fair and impartial verdict. Deck renewed his motion for change of venue

at that point, and the trial court again overruled the motion.

The fact that so many residents of Jefferson County were aware of the case does not alone mandate a change of venue. Although Dr. Warren testified that sixty-nine percent of the residents polled were aware of the case, he conceded on cross-examination that with the passage of time, fewer people would remember what they had heard. Further, although twenty-seven percent said that they held an opinion regarding Deck's guilt, Dr. Warren did not inquire whether those opinions would keep them from following the law and making a determination based on the evidence adduced at trial. As to the prospective jurors, the key concern, as noted, is whether those jurors who had heard about the case held such fixed opinions that they could not make an impartial determination regarding the defendant's guilt. *Feltrop*, 803 S.W.2d at 6. During voir dire, only thirteen of the fifty prospective jurors who had heard about the case stated that their opinions would keep them from being fair and impartial jurors, and of those thirteen, twelve were stricken for cause or otherwise excused. Defense counsel declined to strike the remaining person who apparently changed her response by stating that she had not formed an opinion and could indeed follow the instructions and consider only the evidence at trial. Given the limited inferences that can be made from the polling data and the trial court's effective handling of the voir dire process, there is no indication that Deck was denied a fair and impartial jury.

Citing *Ainsworth v. Calderon*, 138 F.3d 787, 795 (9th Cir.1998), Deck further claims that the pretrial publicity in Jefferson County should be considered presumptively prejudicial. According to *Ainsworth*, "[p]rejudice is presumed

when the record demonstrates that the community where the trial was held was saturated with prejudicial and inflammatory media publicity about the crime." *Id.* Prejudice occurs, for instance, where there is "a barrage of inflammatory publicity immediately prior to trial amounting to a huge . . . wave of public passion." *Id.* (quoting *Patton v. Yount,* 467 U.S. 1025, 1033, 104 S.Ct. 2885, 81 L.Ed.2d 847 (1984)). Under *Ainsworth,* courts should also consider whether the media accounts were primarily factual and whether the accounts contained inflammatory, prejudicial information that was not admissible at trial. *Id.* Under the facts of *Ainsworth,* however, the court determined that the media coverage was not presumptively prejudicial because the coverage was factual in nature and occurred, for the most part, several months before trial. *Id.* The case at hand is similar: The media accounts were factual in nature and occurred long before trial, and there was no "barrage of inflammatory publicity immediately prior to trial."

The evidence presented at the hearing on Deck's motion for change of venue and during voir dire did not show that the residents of Jefferson County were so prejudiced against him that a fair trial could not occur. As such, the trial court did not abuse its discretion in denying the motion for a change of venue.

III. Motion to Suppress

Deck next claims that the trial court erred by overruling his motion to suppress and in admitting at trial the statements he made to the police as well as the pistol and other items seized from his car. In support of his claim, Deck states that Officer Wood did not have "reasonable

suspicion" to stop him on the parking lot, and therefore the stop was unlawful. As a result, he contends, the evidence seized and his incriminating statements should have been excluded as "fruit of the poisonous tree." Deck concludes that introduction of the evidence at trial violated his rights to due process of law, to be free from unreasonable search and seizure, to reliable sentencing, and to be free from cruel and unusual punishment under the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution and article I, sections 10, 15, 18(a), and 21 of the Missouri Constitution.

At a hearing on a motion to suppress and ultimately at trial, the state has the burden to justify a warrantless search and seizure. *State v. Villa-Perez,* 835 S.W.2d 897, 902 (Mo. banc 1992). In reviewing the trial court's ruling on the matter, this Court considers the record made at the suppression hearing as well as the evidence introduced at trial. *State v. Hohensee,* 473 S.W.2d 379, 380 (Mo.1971); *State v. Howard,* 973 S.W.2d 902, 908 (Mo.App.1998).

The Fourth Amendment of the United States Constitution preserves the right of the people to be secure against unreasonable searches and seizures. Missouri's constitutional "search and seizure" guarantee, article I, section 15, is co-extensive with the Fourth Amendment. *State v. Rushing,* 935 S.W.2d 30, 34 (Mo. banc 1996). A warrant based upon probable cause is generally required to justify a search or seizure. However, the Fourth Amendment does not prohibit a so-called "*Terry*" stop – a stop followed by a "frisk" or "pat-down" for weapons – that is based on reasonable suspicion supported by articulable facts that the person stopped is engaged in criminal activity. *Terry v. Ohio,* 392 U.S. 1, 30, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). *Terry* "stop and frisk" principles have

been extended to motor vehicle stops so that police who have the requisite reasonable suspicion may conduct a "search of the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden. . . ." *Michigan v. Long,* 463 U.S. 1032, 1049, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983). "Reasonable suspicion," which is a less demanding standard than "probable cause," *Alabama v. White,* 496 U.S. 325, 330, 110 S.Ct. 2412, 110 L.Ed.2d 301 (1990), is to be determined by reference to the "totality of the circumstances." *Id.* (citing *United States v. Cortez,* 449 U.S. 411, 417, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981)).

Although the state's evidence presented at the suppression hearing and at trial was uncontested, a more detailed recitation of that evidence is necessary to evaluate the grounds for reasonable suspicion. On the day of the murders, an individual identified as Charles Hill told the Jefferson County Sheriff's Office that he believed that Deck and his sister were involved in a robbery and/or homicide in Jefferson County, that they would be driving a gold two-door car, and that they probably were armed. This information was relayed to the St. Louis County Police, and Officer Woods was dispatched to locate Deck and his sister at their last known address, an apartment complex in St. Louis County.

Sometime after 11 o'clock at night, Officer Wood, who was parked in his vehicle on the side of the road at the apartment complex, saw Deck drive by alone in a two-door gold car and pull into a parking space. The lights to Deck's car were not illuminated even though it was dark. Officer Wood walked toward Deck's car, identified himself as a police officer, and shined his flashlight into the car, whereupon Deck turned away from him and leaned down

toward the passenger side of the vehicle. At that point, Officer Wood ordered Deck to sit up and show his hands, and when Deck complied, Officer Wood then asked him to get out of the car. Once outside the car, Officer Wood patted Deck down for weapons, and finding none, then searched the passenger side of the vehicle while a back-up officer detained Deck. When the search revealed a pistol concealed underneath the front seat, Officer Wood placed appellant under arrest for unlawful use of a weapon. The police then impounded the vehicle, and during an inventory search, Officer Wood found the victims' decorative tin filled with coins on the vehicle's floorboard. As noted, Deck later made oral, written, and taped statements.

Deck's primary argument, as we understand it, is that he was unlawfully stopped, or "seized," for the offense of driving without lights when Officer Wood first approached him as he parked the car. As Deck explains, there was no probable cause to be stopped because the statute defining the offense, section 307.040.1, RSMo 1994, applies only to public streets and highways, not to private parking lots like the one at the apartment complex. Regardless of the presence or absence of probable cause under the statute, however, Deck's argument fails because no stop or seizure took place when Officer Wood first approached the car. A person is not "seized" until either being subjected to the application of physical force by the police or by voluntarily submitting to the assertion of police authority. *California v. Hodari D.,* 499 U.S. 621, 626, 111 S.Ct. 1547, 113 L.Ed.2d 690 (1991). Here, Officer Wood did not stop Deck's car, nor did he display his weapon as he approached the vehicle, and instead he merely identified himself and said something like "how you doing?" Under these circumstances, Deck was not subject to the physical control of

Officer Wood nor did he submit to Officer Wood's authority when the officer approached the vehicle.

That is not to say, however, that Officer Wood could not have lawfully stopped Deck when he first saw him. Even if there was no probable cause to stop Deck for the *offense* of driving without lights, the *act* of driving without lights late at night in a residential parking lot was some indication that criminal activity was afoot, separate from the offense of driving without lights, itself. That evidence, when coupled with the information relayed by the dispatcher to Officer Wood – that Deck and his sister would be driving a two-door gold car and should be considered armed and dangerous – constituted "reasonable suspicion" that would justify a "*Terry*" stop, at the least.

Notwithstanding Officer Wood's justification to stop Deck when he first pulled into the parking lot, the actual stop or seizure did not occur until later in the sequence of events when even more evidence developed that gave rise to "reasonable suspicion." Deck's reaction to the initial encounter with Officer Woods was to turn away and reach down toward the passenger side of the vehicle as if he was reaching for something or attempting to conceal something. Only when Officer Wood ordered Deck to sit up and display his hands, and Deck then complied, thereby submitting to the assertion of police authority, did the seizure occur. *See Hodari D.*, 499 U.S. at 626, 111 S.Ct. 1547. The state's evidence was more than ample to support a reasonable and articulable suspicion that Deck was engaged in criminal activity. *See State v. Hunter,* 783 S.W.2d 493, 495 (Mo.App.1990) (officer had reasonable suspicion to justify investigatory stop where passenger ducked out of sight in an apparent effort to hide something under the seat when officer turned on his "take-down"

lights). Thus, under *Terry,* Officer Wood was justified in conducting the ensuing detention, the order to exit the car, and the pat-down search for weapons. In addition, under *Michigan v. Long,* 463 U.S. at 1051, 103 S.Ct. 3469 Officer Wood's subsequent search of the passenger area of the car and the seizure of the pistol from beneath the passenger seat were permissible as part of a "protective sweep" for weapons. Further, after finding the pistol, Officer Wood had probable cause to arrest Deck for unlawful use of weapons. Considering the totality of the circumstances, Officer Wood's conduct was lawful in all of these respects.

As a secondary point, Deck contends that the detention, search and seizure were unlawful because they were based on an informant's tip without any showing that the source of the information was reliable. Although the informant identified himself as Charles Hill, the record does not reveal whether the police had any gauge of his reliability at the time the tip was made,[1] and accordingly, Deck analogizes the situation to cases involving anonymous tips. While it is correct, in general, that a detention and search and seizure is unlawful if conducted solely on the basis of an anonymous tip, *Alabama v. White,* 496 U.S. at 329, 110 S.Ct. 2412, no case has held that an anonymous tip must be ignored in determining whether "reasonable suspicion" exists. Instead, police may properly consider such evidence if it is in conjunction with, as here, other, independent corroborative evidence suggestive of

[1] Charles Hill testified at the preliminary hearing that he was a retired Marine sergeant and a former boyfriend of Tonia Cummings, who overheard Deck and Cumming's plan for the robbery/murder about a week before it was carried out. Hill did not, however, testify at the suppression hearing or at trial.

criminal activity. *Id.* at 329-332, 110 S.Ct. 2412. In this case, the information from Hill was corroborated by Officer Wood's observation of 1) a two-door, gold car that matched the description of the car Deck was said to be driving and that pulled in the parking lot of the apartment complex where Deck was said to reside; 2) the same car being driven with the lights off late at night as if to avoid detection; and 3) the driver's reaction when he first saw Officer Woods. In essence, the evidence that corroborates the anonymous tip is the same evidence that, when considered with the anonymous tip, constitutes the grounds for reasonable suspicion.

Because the state has met its burden of showing that no Fourth Amendment violation occurred, this Court holds that the trial court correctly overruled the motion to suppress and properly admitted the evidence in question at trial.

IV. Voir Dire

A. Gender-*Batson* Challenges

Deck next claims that the trial court erred in overruling his objections to the state's peremptory strikes of two female venirepersons in violation of *Batson v. Kentucky,* 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), and *J.E.B. v. Alabama ex rel. T.B.,* 511 U.S. 127, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994). In *Batson,* the United States Supreme Court prohibited the use of peremptory strikes to exclude potential jurors based on race, *Batson,* 476 U.S. at 97, 106 S.Ct. 1712, and in *J.E.B., Batson* was extended to prohibit peremptory strikes on the basis of gender. *J.E.B.,* 511 U.S. at 146, 114 S.Ct. 1419.

Missouri has adopted a three-step process for making a successful *Batson* challenge. *State v. Parker,* 836 S.W.2d 930, 939 (Mo. banc 1992). First, the defendant must object to the state's peremptory strike and identify the protected class to which the prospective juror belongs. *Id.* The state is then required to provide a reasonably specific and clear, race and/or gender-neutral explanation for the strike. *Id.* If the state provides such an explanation, the burden then shifts to the defendant to show that the state's explanation was pretextual and that the strike was actually motivated by the prospective juror's race or gender. *Id.*

In evaluating the prosecutor's explanation, the chief consideration is whether the explanation is plausible in light of the totality of the facts and circumstances surrounding the case. *Id.* While the presence of similarly-situated white or male jurors is probative of pretext, it is not dispositive. *Id.* This Court will reverse the trial court's decision on a *Batson* challenge only upon a showing of clear error. *Id.*

The first of the two gender *Batson* challenges involved prospective juror number sixteen, a female, who the prosecutors struck with the following explanation:

> MR. JERRELL: Your Honor, the first time I laid eyes on . . . and heard her speak, I thought she was a very weak juror. In fact, that's what I wrote in my notes during the middle of voir dire. Also her son's been prosecuted . . . and I can't even read my own writing, but I don't want any juror on there, at least her, where her son's been prosecuted.
>
> MR. WILKINS: Actually it's not her son. Her ex-brother-in-law is in the Department of Corrections

for burglary and his son has a current charge pending in our county.

MR. JERRELL: I stand corrected. Exactly what my notes say. That's my reasons for [her].

MR. WILKINS: Likewise, Your Honor, I had independent of Mr. Jerrell also written the word weak on [her] and independent of him, also based upon.

The prosecutors' responses indicate that prospective juror number sixteen was stricken not because of her gender but because she would be a "weak" juror and she had relatives who had been or were being prosecuted. An explanation based on a prospective juror's general demeanor, which in this case gave rise to the perception that she was "weak," is facially non-discriminatory. *State v. Smulls,* 935 S.W.2d 9, 15 (Mo. banc 1996). So too is the fact of the arrest, conviction, or incarceration of a prospective juror's relative. *State v. Payne,* 958 S.W.2d 561, 565 (Mo.App.1997); *State v. Johnson,* 930 S.W.2d 456, 461-62 (Mo.App.1996). These explanations were reasonably specific, clear and gender-neutral and thus satisfied the second prong of the *Batson* analysis.

The second gender-*Batson* challenges involved prospective juror number fifty, a female, who was struck for the following reasons:

MR. JERRELL: As for [her], I didn't think much of her either. She does have what we believe to be a prior DWI in Kirkwood, which she never mentioned, from our research on her. I also felt that she was not a strong juror. So that's why we decided to strike her.

MR. WILKINS: Quite frankly, she has a prior DWI in the City of Kirkwood. That's what the criminal history record shows. She was very red-cheeked, sixtiesh, sixty-eight, single. My concern, my interest was that that might signal an alcohol habit, problem, whatever. Had nothing to do with the fact that she was female.

The prosecutors' responses indicate that prospective juror number fifty was struck from the panel because she had a prior DWI conviction that she did not disclose. As stated, a prior conviction is an appropriate and neutral basis for a peremptory strike. *Payne,* 958 S.W.2d at 565. Deck argues, however, that the strike was pretextual because the prosecutors chose not to strike a similarly situated male who stated during voir dire that he was arrested and pled guilty to driving while intoxicated. To the contrary, the male prospective juror was not similarly situated to her because he admitted his DWI conviction when the prosecutor asked about prior arrests and convictions during voir dire while she did not. Deck further contends that the prosecutors could not properly base the peremptory strike on her DWI because no information regarding the offense was brought out during voir dire. Deck fails to recognize, however, that lawyers are not prohibited from using information outside the record as a basis for a peremptory strike. *See State v. Whitfield,* 837 S.W.2d 503, 509 (Mo. banc 1992) (arrest records may be accessed for use in selecting jury).

In sum, Deck has not shown that the prosecutors' reasons for striking these two potential jurors were merely pretextual and that the strikes were motivated by gender. The point is denied.

B. Challenge for Cause

Deck also contends that the trial court erred in overruling his motion to strike prospective juror Scott Arnold who gave some indication during voir dire that he might automatically impose the death penalty. According to Deck, this error violated his rights to due process of law, to a fair and impartial jury, to reliable sentencing, and to be free from cruel and unusual punishment as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and article I, sections 10, 18 and 21 of the Missouri Constitution. However, because Deck used a peremptory strike to remove Mr. Arnold from the panel and Mr. Arnold did not serve as a member of the jury, the claim is precluded by section 494.480.4, RSMo 1994, which states:

> The qualifications of a juror on the panel from which peremptory challenges by the defense are made shall not constitute a ground for the granting of a motion for new trial or the reversal of a conviction or sentence unless such juror served upon the jury at the defendant's trial and participated in the verdict rendered against the defendant.

The point is denied.

V. Penalty Phase – Victim Impact Testimony

Deck asserts that the testimony of William Long, the son of the victims, exceeded the guidelines for victim impact evidence established by the United States Supreme Court in *Payne v. Tennessee,* 501 U.S. 808, 825, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991), and that the trial court erred in overruling his motion for a mistrial because of the

resulting emotional reaction in the courtroom. The matter arose as part of the state's penalty phase testimony when William Long read a statement that the family had prepared. After his testimony, three members of the jury were crying, as were members of the Long family who were seated in the courtroom.

Victim impact evidence is admissible under the United States and Missouri Constitutions. *State v. Roberts,* 948 S.W.2d 577, 594 (Mo. banc 1997), *cert. denied.* 522 U.S. 1056, 118 S.Ct. 711, 139 L.Ed.2d 652 (1998). According to *Payne,* just as the defendant is entitled to present evidence in mitigation designed to show that the defendant is a "uniquely individual human being," the State is also allowed to present evidence showing each victim's "uniqueness as an individual human being." *Payne,* 501 U.S. at 822-23, 111 S.Ct. 2597. In particular, "the State is permitted to show that victims are individuals whose deaths represent a unique loss to society and to their family and that the victims are not simply 'faceless strangers.'" *Id.* at 825, 111 S.Ct. 2597. *Payne* also holds that victim impact evidence violates the constitution only if it is so "unduly prejudicial that it renders the trial fundamentally unfair." *Id.* Deck argues that the evidence in this case violated this standard and that the jury based its verdict on emotion. He does not, however, complain of the testimony itself, but of the emotional level in the courtroom and the effect it had on the jury.

Although emotional outbursts are to be prevented insofar as possible, the trial court exercises broad discretion in determining the effect of such outbursts on the jury. *State v. Brooks,* 960 S.W.2d 479, 491 (Mo. banc 1997), *cert. denied,* 524 U.S. 957, 118 S.Ct. 2379, 141 L.Ed.2d 746 (1998). Additionally, this Court has held that "[i]n determining

whether to declare a mistrial, the trial court may consider the spontaneity of the outburst, whether the prosecution was at fault, whether something similar, or even worse, could occur on retrial, and the further conduct of the trial." *Id.*

Deck does not point to specific instances in the record that indicate an "extreme emotional level," and therefore, it is difficult to do otherwise than defer to the trial court's discretion. A review of the record does not reflect the "extreme emotional level" Deck describes. There were apparently no emotional outbursts among the family members, only some muted crying during the testimony of the Long children. Furthermore, there is no reason to believe that the family members would not have the same reaction on retrial. In the absence of evidence that emotional outbursts actually occurred, the trial court did not abuse its discretion in overruling Deck's motion for a mistrial.

VI. Penalty Phase – Mitigating Instructions

A. Non-MAI Instructions

Deck next contends that his state and federal constitutional rights were denied when the trial court erroneously refused to submit two non-MAI mitigating circumstance instructions in the penalty phase. Deck's proposed instructions, loosely based on MAI-CR3d 313.44(a), listed six nonstatutory mitigating circumstances for the jury's consideration. This Court again rejects this often-raised claim that the listing of nonstatutory factors in mitigation is constitutionally required. *State v. Clay,* 975 S.W.2d 121, 133 (Mo. banc 1998) *cert. denied,* 525 U.S. 1085, 119 S.Ct. 834, 142 L.Ed.2d 690 (1999); *Rousan,* 961 S.W.2d at 849.

B. Defective Submission of MAI-CR3d 313.44A

Deck raises the far more problematic claim that the defective submission of Instructions No. 8 and No. 13, the penalty phase instructions on the submission of mitigating circumstances, constituted plain error and violated his right to due process of law, to reliable sentencing, and to be free from cruel and unusual punishment as guaranteed by the Fifth, Eighth and Fourteenth Amendments to the United States Constitution and article I, sections 10 and 21, of the Missouri Constitution. The defect was that the final two paragraphs of MAI-CR3d 313.44A, the pattern mitigating circumstances instruction, were inadvertently omitted from Instructions No. 8 and No. 13. That omission, as Deck maintains, created a reasonable likelihood that the jurors mistakenly believed they had to find the existence of any specific mitigating circumstance *by unanimous vote*.

Instruction No. 8, as submitted to the jury, stated:

INSTRUCTION NO. 8

As to Count I, if you unanimously find that the facts and circumstances in aggravation of punishment, taken as a whole, warrant the imposition of a sentence of death upon the defendant, you must then determine whether there are facts or circumstances in mitigation of punishment which are sufficient to outweigh the facts and circumstances in aggravation of punishment. In deciding this question, you may consider all of the evidence presented in both the guilt and the punishment stages of the trial.

Instruction No. 13 was identical, except that it referred to Count III.

The final two paragraphs of MAI-CR 3d 313.44A, which were omitted from the instructions in this case, read as follows:

> You shall also consider any (other) facts or circumstances which you find from the evidence in mitigation of punishment.
>
> It is not necessary that all jurors agree upon particular facts and circumstances in mitigation of punishment. If each juror determines that there are facts or circumstances in mitigation of punishment sufficient to outweigh the evidence in aggravation of punishment, then you must return a verdict fixing defendant's punishment at imprisonment for life by the Department of Corrections without eligibility for probation or parole.

Because Deck failed to object to these instructions at trial, this Court is asked to review for plain error. For instructional error to rise to the level of plain error, the trial court must have so misdirected or failed to instruct the jury so that it is apparent that the instructional error affected the verdict. *State v. Doolittle,* 896 S.W.2d 27, 29 (Mo. banc 1995).

In a capital case, the sentencer may not be precluded from considering, as a mitigating factor, any relevant circumstance that the defendant proffers as a basis for a sentence less than death. *Mills v. Maryland,* 486 U.S. 367, 374, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988). This principle is violated if the jury is given an instruction that could

reasonably be interpreted as precluding them from considering any mitigating evidence unless the jurors unanimously agree on the existence of such evidence. *Id.* at 384, 108 S.Ct. 1860. On the other hand, there is no constitutional requirement that the jury in a capital case be given any particular guidance as to how to undertake the discretionary sentencing decision. *Buchanan v. Angelone,* 522 U.S. 269, 118 S.Ct. 757, 761-62, 139 L.Ed.2d 702 (1998).

The fallacy of Deck's argument – that the jury was likely misled into believing that they had to find mitigating circumstances by unanimous vote – is that it wrongly assumes that the omitted paragraph was necessary to comply with the holding in *Mills*. *See State v. Petary,* 790 S.W.2d 243 (Mo. banc 1990). Before MAI-CR 3d 313.44 was revised, effective January 1, 1989, the omitted paragraph was not part of the pattern instruction, and in its place, was a paragraph that read as follows:

> If you unanimously find that one or more mitigating circumstances exist sufficient to outweigh the aggravating circumstances found by you to exist, (then) (then, on Count ___) you must return a verdict fixing defendant's punishment at imprisonment for life by the Division of Corrections without eligibility for probation or parole.

Like Instructions No. 8 and No. 13 in this case, the old version of the pattern instruction did not specifically advise the jurors that they need not unanimously find the existence of a particular mitigating facts or circumstances. Nonetheless, the old version, despite the alleged defect, survived essentially the same constitutional challenge under *Mills* that is now brought in this case. *State v. Weaver,* 912 S.W.2d 499, 518 (Mo. banc 1995); *Petary,* 790 S.W.2d at 245. Although the alleged defect in this case was

the omission of the final paragraph of the instruction, rather than the inclusion of an allegedly defective paragraph in the old version of the instruction, the alleged defect is essentially the same – that both instructions purported to require unanimous votes on mitigating circumstances.

The rationale of this Court's holding in *Weaver* and *Petary* is that when the instructions in question are considered in conjunction with all the other instructions, the jury is not misled. *Id*. Here, as in *Weaver* and *Petary*, additional explanatory instructions were submitted for both counts. Those instructions, No. 9 and No. 14, were based on MAI-CR 3d 313.46A and were identical except for reference to different counts. Instruction No. 9 stated:

> As to Count I, you are not compelled to fix death as the punishment even if you do not find the existence of facts and circumstances in mitigation of punishment sufficient to outweigh the facts and circumstances in aggravation of punishment. You must consider all the evidence in deciding whether to assess and declare the punishment at death. Whether that is to be your final decision rests with you.

This Court observed in *Petary* that MAI-CR 3d 313.46A informs the jury,

> in unmistakable terms that it is never obliged to return death sentence. It has already been told that, in making this decision, it may consider any circumstances it finds in mitigation of punishment. It is clear that in making this final resolution each juror may consider any fact or circum stance which he or she considers sufficient to indicate mitigation, or, for that matter, a juror may vote against a death sentence without having a reason.

Petary, 790 S.W.2d at 246.

Because Instructions No. 9 and No. 14 were submitted along with Instructions No. 8 and No. 13, it was made clear to each juror that he or she was individually afforded the discretion to find mitigating circumstances, without unanimity with the other jurors, and vote against a death sentence on the basis of those individual findings alone. Furthermore, the possibility that the jurors were misled should be discounted even more by the fact that defense counsel argued forcefully in his closing that each juror had the individual right to vote for a sentence of life.

Despite Deck's assertions, Instructions No. 8 and No. 13 explicitly require unanimity only in finding facts and circumstances in *aggravation* of punishment. There is no basis for reading that requirement into the rest of the instruction. In fact, it is all the more unlikely that the jurors perceived a unanimity requirement in this case, because there were no statutory mitigators submitted for their consideration. The instructions, as given and taken as a whole, effectively guided the jurors through the deliberation process as set out in sections 565.030 and 565.032, RSMo 1994, and there is no reasonable likelihood that the jury applied the challenged instructions in a way that prevented the consideration of mitigating circumstances.

In a related argument, Deck contends that the jury was not instructed that they must return a verdict fixing punishment at imprisonment for life if the evidence in mitigation of punishment was sufficient to outweigh the evidence of aggravation of punishment, as required by

section 565.030.4(3), RSMo 1994. We disagree. While it is true that Instructions No. 8 and No. 13 did not explicitly mandate the punishment at life imprisonment if the circumstances in mitigation outweighed the circumstances in aggravation, it was nonetheless clear from the other instructions that that result must follow because life imprisonment was the only sentencing alternative available. The point is denied.

C. Failure to Define "Mitigating"

The next issue involves an unusual incident that occurred during the jury's deliberations. The jury sent a note to the trial court asking, "What is the legal definition of mitigating (as in mitigation circumstances)? Instruction 8." The trial court replied, "Any legal terms in the instructions that have a 'legal' meaning would have been defined for you. Therefore, any terms that you have not had defined for you should be given their ordinary meaning." The jury followed up with a note inquiring "Can we have a dictionary?" The trial court informed the jury, "No, I'm not permitted to give you one." Deck contends that this apparent confusion on a legal issue obligated the trial court to provide the requested definition and that the failure to do so compounded the error concerning the omitted paragraphs from Instructions No. 8 and No. 13. Significantly, Deck did not raise this issue at trial. When the jury posed the questions, Deck did not request that the term "mitigating" be defined, nor did he object to the trial court's responses. In the absence of an objection, Deck asks for plain error review under the manifest injustice standard of Rule 30.20.

Despite the fact that one or more jurors may have been confused, the trial court gave the correct responses to the questions. The first question was a request for the "legal definition" of "mitigating," but this word is not defined in the MAI-CR 3d instructions. *See* MAI-CR 3d 313.44A (10-1-94); MAI-CR 3d 333.00 (1-1-87). This Court has held that "[w]hen MAI notes on use do not provide for a definition, the court must not give one." *State v. Feltrop,* 803 S.W.2d 1, 14 (Mo. banc 1991). In *State v. Wise,* 879 S.W.2d 494, 518 (Mo. banc 1994), a case particularly on point, the defendant claimed the trial court erred in refusing the defendant's tender of an instruction defining the term "mitigation." In upholding the trial court's ruling, this Court stated, "MAI instructions do not define 'mitigation'; therefore, the court properly refused the proposed definition." *Id.* Consistent with *Feltrop* and *Wise*, the notes on use to the MAI-CR 3d instruction on definitions provides:

> A definition of a term, word, or group of words shall not be given unless permitted by paragraphs A, B, C, D, or E above, [not applicable in this case] even if requested by counsel or the jury. If the jury, while deliberating, requests the definition of a term whose definition is not permitted by paragraphs A, B, C, D, or E above, the following response is suggested:
>
> I am not permitted to define the word(s) ____ for you. (Except for those terms for which you have been supplied definitions, each) (Each) word used in the instruction has its common and generally understood meaning.

MAI-CR 3d 333.00 (1-1-87), Note on Use 2. As noted, the trial court followed this instruction to the letter. No error was committed.

Additionally, the trial court was correct in refusing to provide a dictionary for the jury. All courts view the use of a dictionary as highly improper because the jury should rely solely upon the evidence and the court's instructions. *State v. Suschank,* 595 S.W.2d 295, 297-98 (Mo.App.1979). The impropriety of permitting jurors to search a dictionary is that it allows them to select at will definitive language that might misrepresent the court's instructions. *State v. Taylor,* 581 S.W.2d 127, 129 (Mo.App.1979). In view of these cases, Deck's position that the judge may supplement an instruction with a dictionary definition is not persuasive.

The essence of Deck's argument is that the penalty phase instructions, and the mitigating circumstances instructions in particular, are too easily misunderstood. At the hearing on the motion for new trial, Deck called Dr. Richard Weiner, a psychologist, who testified that "Missouri penalty phase instructions are poorly understood." Dr. Weiner explained that he came to that conclusion as a result of a study he conducted that also showed that jurors have the most difficulty with the concept of mitigation. Dr. Weiner's study, however, must be discounted because the people interviewed for the study did not act as jurors. They were given hypothetical facts that were different than the facts in this case, and they did not hear the testimony of witnesses, observe physical evidence or deliberate with eleven other jurors. More importantly, in the context of the instructions as a whole, the term "mitigating" is always contrasted with the term "aggravating" so that no reasonable person could fail to understand that "mitigating" is the opposite of "aggravating." That contrast, for instance, is highlighted in Instructions No. 9 and No. 14, which were based on MAI-CR 3d 313.465A and

which stated in pertinent part, "you are not compelled to fix death as the punishment even if you do not find the existence of facts and circumstances in mitigation of punishment sufficient to outweigh the facts and circumstances in aggravation of punishment. . . ."

Finally, Deck's suggestion that the jury's confusion about the word "mitigating" was due in large part to the omission of the concluding paragraphs to Instructions No. 8 and No. 13 likewise has no merit. Those omitted paragraphs do not even purport to define mitigation for the jury. Moreover, Deck's notion that the jury questions reveal that some jurors "thought they were prohibited from considering certain facts or circumstances as 'mitigating'" and therefore in violation of *Mills v. Maryland,* rests on pure speculation and does not logically follow from the content of the questions.

For these reasons, this Court concludes that the trial court committed no error in refusing to define the term "mitigating" or to provide the jury with a dictionary.

VII. Penalty Phase – Closing Argument

Deck next alleges that the trial court erred in permitting the prosecutor to make improper comments during penalty phase closing argument. The trial court has broad discretion in controlling the scope of closing argument and the court's rulings will be cause for reversal only upon a showing of abuse of discretion resulting in prejudice to the defendant. *State v. Rousan,* 961 S.W.2d 831, 851 (Mo. banc), *cert. denied,* 524 U.S. 961, 118 S.Ct. 2387, 141 L.Ed.2d 753 (1998). In order for a prosecutor's statements to have such a decisive effect, there must be a reasonable probability that the verdict would have been different had

the error not been committed. *State v. Barton,* 936 S.W.2d 781, 786 (Mo. banc 1996).

A. Mercy Argument

The first particularized claim is that the prosecutor stated that the jury should impose the death penalty because that was "the only sentence [the jury could] impose to show justice and to show mercy to those people, to the people in the courtroom." Defense counsel objected to the statement and requested a mistrial. The trial court sustained the objection, but overruled the motion for a mistrial. The trial court then granted the prosecutor permission to rephrase the comment, but did not advise the jury that the objection had been sustained. Deck argues that the trial court's inaction violated his rights to due process of law, a fair trial, reliable sentencing, and to be free from cruel and unusual punishment as guaranteed by the Fifth, Eighth and Fourteenth Amendments to the United States Constitution and article I, sections 10, 18(a) and 21 of the Missouri Constitution.

Deck's argument focuses on the fact that the trial judge did not advise the jury that the objection had been sustained. However, Deck never requested that the trial court advise the jury that the objection was sustained, and, instead, the trial court took sufficient curative action on its own initiative and properly instructed the prosecuting attorney to rephrase his argument.

The need for curative action assumes, of course, that the prosecutor's mercy argument was improper in the first place. Prosecutors may discuss the concept of mercy in their closing arguments because mercy is a valid sentencing consideration, *Rousan,* 961 S.W.2d at 851, and in that

connection may argue that the defendant should not be granted mercy. Prosecutors cannot, however, argue that the jurors may not lawfully grant a defendant mercy by imposing a life sentence. *Id.* In this case, the prosecutor did not argue that the jurors could not lawfully grant mercy on appellant; thus, Deck's argument has no merit.

B. Personalization

Deck also claims that the trial court erred in permitting the prosecutor to personalize his penalty phase closing argument. The prosecutor told the jury that while they were deliberating, they should "count out ten minutes and you think about how long that is and then think about somebody pointing a gun at your head at the same time." No objection was made to the prosecutor's argument; therefore, Deck requests plain error review.

Relief should rarely be granted on an assertion of plain error in closing argument. *State v. Silvey,* 894 S.W.2d 662, 670 (Mo. banc 1995). The reason, as this Court has explained, is that "in the absence of objection and request for relief the trial court's options are narrowed to uninvited interference with [the closing argument] and a corresponding increase of error by such intervention." *Id.* In order to be entitled to relief, appellant must make a substantial showing that manifest injustice will result if relief is not granted. *State v. Wood,* 719 S.W.2d 756, 759 (Mo. banc 1986).

Deck argues that the prosecutor's comment urging the jurors to put themselves in the place of the victim was the same kind of improper personalization this Court condemned in *State v. Storey,* 901 S.W.2d 886, 901 (Mo. banc 1995). In *Storey,* the prosecutor told the jurors to put

themselves in the victim's place and then graphically described the crime to the jurors as if they were the victims. This Court concluded that the prosecutor's argument was improper because it "could only arouse fear in the jury," *id.*, and moreover, arguments that inflame and arouse fear in the jury are especially prejudicial when the death penalty is at issue. *Id.* (citing *State v. Tiedt,* 357 Mo. 115, 206 S.W.2d 524, 529 (Mo. banc 1947)).

The prosecutor's argument in this case is distinguishable from the prosecutor's argument in *Storey*. Here, the prosecutor's comments were brief and isolated and did not involve graphic detail, and as such, they did not result in manifest injustice. The point is denied.

VIII. Reasonable Doubt Instruction

Deck claims that the trial court erroneously submitted instructions in both guilt phase and penalty phase by defining "proof beyond a reasonable doubt" with the words, "firmly convinced." Citing *Cage v. Louisiana,* 498 U.S. 39, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990), Deck contends that this language allowed the jury to reach its decisions on both guilt and punishment based upon a level of proof less than that which is constitutionally mandated. This Court has consistently and repeatedly denied Deck's precise claim. The phrase "firmly convinced" is essentially synonymous with the phrase "beyond a reasonable doubt." *State v. Barnett,* 980 S.W.2d 297 (Mo. banc 1998), *cert. denied,* 525 U.S. 1161, 119 S.Ct. 1074, 143 L.Ed.2d 77 (1999); *State v. Jones,* 979 S.W.2d 171 (Mo. banc 1998), *cert. denied,* 525 U.S. 1112, 119 S.Ct. 886, 142 L.Ed.2d 785 (1999); *State v. Johnson,* 968 S.W.2d 686 (Mo. banc 1998). The point is denied.

IX. Independent Review under Section 565.035.3

Under section 565.035.3, RSMo 1994, this Court is required to determine:

> 1) Whether the sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor;
>
> 2) Whether a statutory aggravating circumstance and any other circumstances found by the trier of fact were supported by the evidence; and
>
> 3) Whether the sentence is excessive or disproportionate to the punishment imposed in similar cases, considering both the crime, the strength of the evidence and the defendant.

Having thoroughly reviewed the record, this Court is satisfied that there is no evidence to suggest that the punishment imposed was a product of passion, prejudice, or any other arbitrary factor.

With regard to statutory aggravating circumstances, the jury found: 1) that each murder was committed while the defendant was engaged in the commission of another unlawful homicide, section 565.032.2(2); 2) that the murders were committed for the purpose of receiving money or any other thing of monetary value, section 565.032.2(4); 3) that the murders were outrageously and wantonly vile, horrible, and inhuman in that they involved depravity of mind, section 565.032.2(7); 4) that the murders were committed for the purpose of avoiding a lawful arrest, section 565.032.2(10); 5) that the murders were committed while defendant was engaged in the perpetration of burglary, section 565.032.2(11); and 6) that the murders were committed while defendant was engaged in the perpetration of robbery, section 565.032.2(11). From

this Court's review of the record, the evidence amply supports the statutory aggravators found by the jury.

Finally, the imposition of the death penalty in this case is clearly not excessive or disproportionate. The strength of the evidence and the circumstances of the crime far outweigh any mitigating factors in Deck's favor.

There are numerous Missouri cases where, as here, the death penalty was imposed on defendants who murdered more than one person. *See, e.g., State v. Johnson,* 968 S.W.2d 123 (Mo. banc 1998); *State v. Clemons,* 946 S.W.2d 206 (Mo. banc 1997); *State v. Ramsey,* 864 S.W.2d 320 (Mo. banc 1993); *State v. Mease,* 842 S.W.2d 98 (Mo. banc 1992); *State v. Hunter,* 840 S.W.2d 850 (Mo. banc 1992); *State v. Ervin,* 835 S.W.2d 905 (Mo. banc 1992); *State v. Powell,* 798 S.W.2d 709 (Mo. banc 1990); *State v. Reese,* 795 S.W.2d 69 (Mo. banc 1990); *State v. Sloan,* 756 S.W.2d 503 (Mo. banc 1988); *State v. Griffin,* 756 S.W.2d 475 (Mo. banc 1988); *State v. Murray,* 744 S.W.2d 762 (Mo. banc 1988); *State v. Young,* 701 S.W.2d 429 (Mo. banc 1985).

In addition, a sentence of death has often been imposed when the murder involved acts of brutality and abuse that showed depravity of mind. *See, e.g., State v. Kinder,* 942 S.W.2d 313 (Mo. banc 1996); *State v. McMillin,* 783 S.W.2d 82 (Mo. banc 1990); *State v. Sidebottom,* 753 S.W.2d 915 (Mo. banc 1988); *State v. Walls,* 744 S.W.2d 791 (Mo. banc 1988); *State v. Lingar,* 726 S.W.2d 728 (Mo. banc 1987); *State v. Roberts,* 709 S.W.2d 857 (Mo. banc 1986).

This Court has also upheld the death sentence where the murder was committed in hopes of avoiding arrest or detection. *State v. Clemons,* 946 S.W.2d 206 (Mo. banc 1997); *State v. Copeland,* 928 S.W.2d 828 (Mo. banc 1996);

State v. Richardson, 923 S.W.2d 301 (Mo. banc 1996); *State v. Gray,* 887 S.W.2d 369 (Mo. banc 1994); *State v. Ramsey,* 864 S.W.2d 320 (Mo. banc 1993); *State v. Six,* 805 S.W.2d 159 (Mo. banc 1991); *State v. Kilgore,* 771 S.W.2d 57 (Mo. banc 1989); *State v. Griffin,* 756 S.W.2d 475 (Mo. banc 1988); *State v. Grubbs,* 724 S.W.2d 494 (Mo. banc 1987); *State v. Foster,* 700 S.W.2d 440 (Mo. banc 1985).

The death penalty imposed in this case is proportionate to the sentence imposed in similar cases.

X.

For the foregoing reasons, the judgment is affirmed.

All concur.

Office of Circuit Clerk

HOWARD WAGNER

State of Missouri Div. No. 2

VS

Carmen Deck

Docket No.

Case No. CR196-1084-FX-J2

In the CIRCUIT COURT JEFFERSON COUNTY, MISSOURI

4/9 20 03

MEMORANDUM

6 or 12 JURORS
WITNESS OATH

COURT REPORTER
APPT. AD. LITEM ATTY.

The Jefferson county jail is hereby ordered to allow the defendant Carmen Deck to dress in court clothes for trial starting on 4/29/03.

SO ORDERED:

/s/ Gary P. Kramer

4-9-03

Copies to atty

SO ORDERED:

/s/ [Illegible]
PLF. ATTORNEY

/s/ David Bruns
DEF. ATTORNEY

IN THE CIRCUIT COURT OF JEFFERSON COUNTY
STATE OF MISSOURI

STATE OF MISSOURI, Plaintiff	)	Cause No. CR196-1084FXJ2
	)	Division No. 2
v.	)	
CARMAN DECK, Defendant	)	

MOTION TO HAVE ACCUSED APPEAR AT TRIAL FREE OF RESTRAINTS

COMES NOW Carman Deck, by and through counsel, and requests the Court to allow Mr. Deck to appear at trial free from shackles and restraints. In support thereof, Mr. Deck alleges:

1. Mr. Deck has not disrupted any court proceeding throughout the pendency of this case.

2. To require Mr. Deck to appear in restraints of any kind would violate Mr. Deck's right to be presumed innocent, his right to remain silent, right to equal protection of the laws, right to due process, right to be free of cruel and unusual punishment, and right to trial by a fair and impartial jury, pursuant to Article I, Sections 2, 10, 18(a), 19 and 21 to the Missouri Constitution, and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. *See Estelle v. Williams,* 425 U.S. 501, 96 S.Ct. 1691, 1697 (1976) (The State cannot, consistently with the Fourteenth Amendment, compel an accused to stand trial before a jury while dressed in identifiable prison clothes.)

3. "Of coursed, a defendant is entitled to the physical indicia of innocence, otherwise the legal presumption of innocence may be weakened." *United States v. Jackson,* 549 F.2d 517, 526-27 (8th Cir. 1976). Although it is clear that a trial court has "considerable, but not unlimited, discretion" to compel the use of restraints for the purpose of maintaining order and security in the courtroom, "if the use of security measures is not supported by good cause, a defendant is entitled to appear before the jury unfettered." *See State v. Jimerson*, 820 S.W.2d 500, 503 (Mo. App. 1991); *State v. Endicott*, 881 S.W.2d 661, 663 (Mo. App. 1994); *State v. Guinan*, 665 S.W.2d 325, 331 (Mo. banc 1984); *State v. Gilmore*, 661 S.W.2d 519, 525 (Mo. banc 1983). If the trial judge finds that 'good reason' or 'exceptional circumstances' exist, he may require the physical restraint of the defendant." *State v. Endicott*, 881 S.W.2d at 663. The question then becomes, what constitutes "good cause", "good reason," or "exceptional circumstances," and what other restrictions, if any, are placed upon trial judges before they may exercise their discretion to restrain an accused in the presence of the jury.

4. An analysis of the constitutional right of an accused to appear unfettered before a jury must begin with *Illinois v. Allen,* 397 U.S. 337, 90 S.Ct. 1057 (1970). The context of *Allen* was an assertion that the appellant's Sixth Amendment right to confront the witnesses against him had been violated because he was removed from the courtroom for portions of his trial due to his extraordinarily disruptive and disrespective behavior. *Id.* at 1060. While holding that the accused's right to be present is not absolute and may be lost "after he has been warned by the judge that he will be removed if he continues his disruptive behavior, [if] he . . . insists on conducting himself in a

manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom," the Supreme Court went on to give trial court judges "sufficient discretion to meet the circumstances of each case." *Id.* at 1060-61. The Court set forth three "constitutionally permissible ways for a trial judge to handle an obstreperous defendant. . . ." *Id.* at 1061. Among these three constitutionally permissible choices is binding and gagging the defendant. *Id.* The other options the Court sanctioned were holding the accused in contempt or removing him from the courtroom. *Id.* The Court, however, recognized that even "to contemplate such a technique [binding and gagging], much less see it, arouses a feeling that no person should be tried while shackled and gagged except as a last resort. Not only is it possible that the sight of shackles and gags might have a significant effect on the jury's feelings about the defendant, but the use of this technique is itself something of an affront to the very dignity and decorum of judicial proceedings that the judge is seeking to uphold." *Id.* While holding that, in the case of Mr. Allen, his removal from the courtroom was not unconstitutional, the Court specifically referred to his behavior as "clearly of such an extreme and aggravated nature as to justify either his removal from the courtroom or his total physical restraint." *Id.* at 1062.

5. The United States Supreme Court again referenced the "inherently prejudicial practice" of requiring shackling of a defendant in the presence of the jury in *Holbrook v. Flynn,* 475 U.S. 559, 568, 106 S.Ct. 1340, 1345-46 (1986). In *Holbrook* the trial court had simply "beefed up" the ordinary security in the courtroom by having four uniformed state troopers sitting in the first row of the spectators' section for this trial of six co-defendants on armed bank

robbery charges. There was objection by counsel to the presence of these four uniformed officers. *Id.* at 1343-44. In analyzing the error complained of in *Holbrook,* the Court acknowledged that although the adversary system and the assiduous oversight of a trial judge are supposed to be the insurance of a fair result at trial, "[o]ur faith in the adversary system and in jurors' capacity to adhere to the trial judge's instructions has never been absolute, however. We have recognized that certain practices pose such a threat to the 'fairness of the fact-finding process' that they must be subjected to 'close judicial scrutiny.'" *Id.* at 1345 (Citing *Estelle v. Williams,* 425 U.S. 501, 503-04, 96 S.Ct. 1691, 1692-93, 48 L.Ed.2d 126 (1976) in which the Court noted that "where a defendant is forced to wear prison clothes when appearing before the jury, 'the constant reminder of the accused's condition implicit in such distinctive, identifiable attire may affect a juror's judgment.'") Although the Court in *Holbrook* was dealing with the issue of four uniformed officers in the courtroom, its following comment framing the issue is instructive: "The first issue to be considered here is thus whether the conspicuous, or at least noticeable, deployment of security personnel in a courtroom during trial is the sort of **inherently prejudicial practice that, like shackling, should be permitted only where justified by an essential state interest specific to each trial.**" 106 S.Ct. at 1345-46. (Emphasis added). Going on to discuss the differences between the "inherently prejudicial" practice of shackling and the issue in Mr. Holbrook's case, the Court noted that "[w]hile shackling and prison clothes are unmistakable indications of the need to separate a defendant from the community at large, the presence of guards at a defendant's trial need not be interpreted as a sign that he is particularly dangerous or culpable." *Id.* at

1346. The Court did recognize and discuss the possibility that under certain conditions the sight of a security force in the courtroom could "'create the impression in the minds of the jury that the defendant is dangerous or untrustworthy,'" but did not consider that "any use of identifiable security guards in the courtroom" was "inherently prejudicial," as distinguished from shackling. *Id.* The Court expressed its belief that a case-by-case approach is appropriate on the issue of security guards in the courtroom during trial. *Id.*

6. The 8th Circuit Court of Appeals has addressed this issue of shackling a defendant during trial on more than one occasion, and it is instructive to delineate what that Court has considered "good cause" for this practice. In *Zeitvogel v. Delo,* 84 F.3d 276 (8th Cir. 1996), Mr. Zeitvogel was being tried for a prison murder which occurred in the Missouri State Penitentiary and was shackled during his trial. The issue was before the Court as an allegation of violation of his due process rights which had not been raised in any court below and as an allegation of ineffective assistance of counsel for not objecting to the shackling. *Id.* at 283. The Court found no error in the shackling of Mr. Zeitvogel because at the time of trial he had murder, rape, and assault convictions and had escaped from state custody once before; additionally, the Court noted that the jury would have learned from the trial evidence that Mr. Zeitvogel was an inmate even without seeing the shackles because the trial was the result of charges of a prison murder. *Id.*

7. *United States v. Darden,* 70 F.3d 1507 (8th Cir. 1995) was an appeal from the joint trial of nine co-defendants (two were acquitted) on criminal racketeering enterprise charges that lasted almost nine months in the

Eastern District of Missouri. *Id* at 1516-17. The Court, in rendering its opinion that the trial court had not abused its discretion in implementing certain security measures, referred to these defendants as having been charged with "participating in an extraordinarily violent criminal enterprise with a history of conflict with law enforcement" including "the intimidation and murder of government witnesses." *Id.* at 1533. One of the appellants, Mr. Amerson, raised the issue of the security measures in the courtroom. The five security measures of which Mr. Amerson complained on appeal did not include shackling during trial. *Id.* at 1533. The security measures complained of were: (1) the large numbers of security personnel in the courtroom; (2) the two magnetometers through which entrants to the courtroom had to pass; (3) inspections of the belongings of defense attorneys, initially within view of arriving jurors; (4) the assembling of the jury in a secret location; (5) the transportation of the jurors and defendants to and from the Courthouse in vans operated by the United States Marshal with additional security including armed guards along the street, a convoy of police vehicles, helicopter surveillance, and snipers on the roof of the United States Courthouse in St. Louis. *Id.*

It is noteworthy that in the trial of this case, the defendants were not shackled.

8. In *Gilmore,* 661 S.W.2d 519, 525 (Mo. banc 1983), *cert. denied* 109 S.Ct. 1931, 466 U.S. 945, 80 L.Ed.2d 476, *habeas corpus granted Gilmore v. Armontrout,* 681 F.Supp. 632, *rev'd* 861 F.2d 1061, *cert. denied* 109 S.Ct. 3176, 104 L.Ed.2d 1037, *affirmed* 908 F.2d 385, the defendant was required to sit with leg irons attached during trial. He had previously been convicted of capital murder and had other capital charges pending against him. Holding that the

trial court properly exercised its discretion, the Missouri Supreme Court noted that there was no objection by counsel to this arrangement and that Mr. Gilmore's "legs were under the counsel table concealed from view from the jury and . . . at no time was he moved in the courtroom with restraints for jurors to observe. . . . [a]nd [that] the record [was] destitute of an indication that any juror saw the restraints in place." *Id.* at 525. Clearly, the circumstances cited by the Court, *viz.* the previous capital murder conviction; the other capital murder charges pending; no objection by counsel; the fact that Mr. Gilmore's legs were concealed from the jury; the fact that he was never moved in the courtroom for jurors to see; and the fact that there was no indication in the record that any juror saw the restraints, were important to the Court.

9. In *State v. Sanders,* 903 S.W.2d 234, 236 (Mo. App. E.D. 1995), the defendant was convicted of murder in the first degree. Mr. Sanders' counsel moved for a mistrial after the jury briefly saw Mr. Sanders in handcuffs when he was brought into the courtroom. *Id.* at 238. **"The deputies realized their mistake,** apologized to Defendant's counsel, and apparently uncuffed Defendant immediately." *Id.* (Emphasis added). The Court found no error under these circumstances, specifically noting that the defendant "only briefly appeared before the jury in handcuffs" and noted that it was reasonable for the court to have Mr. Sanders escorted to and from the courtroom in handcuffs. *Id.* at 238-39. This is a very different situation from a defendant being compelled to sit throughout his trial in handcuffs and/or shackles.

10. In *State v. Brooks,* 960 S.W.2d 479, 484 (Mo. banc 1997), Mr. Brooks was tried and convicted of murder in the first degree and related charges and sentenced to

death. He complained on appeal that the trial court erred in denying his motion for mistrial after the bailiffs handcuffed him in front of the jury as the guilty verdicts were being read. *Id.* at 491. At the time of the request for mistrial, the trial judge noted that the incident had occurred in a matter of seconds and that the verdicts had been returned before the handcuffing took place. *Id.* Noting that the declaration of a mistrial is a drastic measure to be employed only in extraordinary circumstances, the Court found no abuse of discretion in denying that motion. *Id.* However, the Court did reiterate the well-established rule that "shackling in the presence of the jury should be avoided if possible. . . . " *Id.* The Court went on to find that in Mr. Brooks' case "the jury saw appellant only after the close of the guilt phase, the jury observed him in shackles only briefly, the jury was dismissed shortly thereafter, and appellant appeared without restraints throughout the remainder of the trial." *Id.*

11. In *State v. Endicott,* 881 S.W.2d 661 (Mo. App. 1994), Mr. Endicott, an inmate at Moberly Correctional Center, was convicted of assault in the second degree and armed criminal action in connection with an assault on two prison guards and another inmate which resulted in one of the guards suffering two puncture wounds in the back and the other inmate suffering three stab wounds, two to the arm and one to the chest resulting in a collapsed lung. *Id.* at 662-63. While ruling that the trial court did not abuse its discretion in ordering Mr. Endicott restrained during his trial, the Court also noted the following regarding that restraint: (1) "[t]he trial court was extremely careful to assure that the jury did not observe Endicott in shackles." (2) "Only his legs were restrained and in doing so the court directed that 'short restraints' be

used so that they would not rattle and that the restraints be placed on him so that they would ordinarily not be visible." (3) "The court also provided that boxes be placed around the table where defendant would sit so that the jury would not observe his restraints." (4) "Furthermore, boxes were to be placed in a similar fashion around the prosecutor's table so as not to call attention to the defendant." (5) "The court advised the parties that if Endicott chose to testify, he would be allowed to enter and exit the witness stand outside the presence of. the jury so that his restraints would not be noticed." *Id.* at 663. The Court concluded that the jury was not in a position to observe the restraints and Mr. Endicott was, therefore, not prejudiced. *Id.*

12. What is abundantly clear from a perusal of cases on both the state and federal level is the following:

(a) The trial court has often taken great pains to insure that the jury does not see the restraints or other security measures; *See United States v. Jackson,* 549 F.2d 517, 527 (8th Cir. 1977) ("[I]t is clear that the jury was carefully shielded from contact with or awareness of the security measures in effect during the course of the trial." No restraints were used); *See State v. Amrine*, 741 S.W.2d 665 (Mo. banc 1987) (Although defendant shackled to his chair, his hands remained free. "It is evident that every effort was made to minimize the chance that the jury would notice the shackles, including declaring a recess so that the jury was not present when defendant was placed on the witness stand." "The judge also stated in the pretrial conference that he did not 'want [defendant] paraded in front of the jury in handcuffs"); *See State v. Endicott,* 881 S.W.2d 661 (Mo. App. 1994) (Defendant's legs restrained. His arms and hands free. Judge ordered

that "short restraints" be used so they would not rattle and that they be placed on him so they would ordinarily not be visible. Moreover, the court also provided that boxes be placed around the table where defendant would sit so that the jury would not observe his restraints. Furthermore, boxes were to be placed in a similar fashion around the prosecutor's table so as not to call attention to the defendant. The court advised the parties that if Endicott chose to testify, he would be allowed to enter and exit the witness stand outside the presence of the jury so that his restraints would not be noticed); *See State v. Gilmore,* 661 S.W.2d 519 (Mo. banc 1983) (Defendant in leg irons only and his legs were under counsel table concealed from view from the jury and at no time was he moved in the courtroom with restraints for jurors to observe).

(b) If the restraints have been seen by a juror or jurors, the glimpse has been brief; *See State v. Jimerson,* 820 S.W.2d 500, 503 (Mo. App. 1991) (Only minimal exposure of shackles to jury due to location of defendant and the table and fact that deputies did not parade him before jury in shackles); *See State v. Brooks,* 960 S.W.2d 479 (Mo. banc 1997) (Defendant convicted of first degree murder, armed criminal action, kidnapping, and attempted forcible rape and sentenced to death. After the guilty verdicts were read, the bailiffs handcuffed Mr. Brooks in the presence of the jury. Court finds that the jury saw him in handcuffs only briefly and that he appeared without restraints throughout the remainder of the trial (penalty phase).

(c) If enhanced security or restraint have been used at trial, it is because the defendant has a history of violent convictions or escape attempts or has exhibited violent or disruptive behavior in the

courtroom or in judge's chambers; *See United States v. Gambina,* 564 F.2d 22, 24 (8th Cir. 1977) (Defendant had a prior conviction for attempted escape; he was involved in another attempted escape; he indicated his intent to escape prior to trial. No restraints were used); *See State v. Johnson,* 850 S.W.2d 401, 402 (Mo. App. W.D. 1993) (Prosecutor requests restraints citing defendant's "fairly violent criminal history, i.e., conviction for first degree assault and armed criminal action; also citing that the defendant was a professional boxer and was on trial for offering violence to a correctional officer. Defense counsel only requested that Mr. Johnson's right hand remain free, which was done); *See State v. Jimerson,* 820 S.W.2d 500, 503 (Mo. App. 1991) (Defendant on trial for offering violence to a correctional officer had previously attempted escape from county jail and had a past history of violence); *See Bibbs v. Wyriek,* 526 F.2d 226, 228 (8th Cir. 1975) (Defendant had reputation for violence and his own counsel requested that two of the strongest bailiffs be assigned to the trial. Morning of trial defendant sent note to judge asking that his counsel be removed; refused to leave his cell to go to courtroom; was forcibly brought to courtroom by sheriff; motion to remove counsel was denied at which time Bibbs rose to his feet announcing in a loud voice that he was not going to trial with his present attorney, then started moving toward the bench and a courtroom exit nearby at which point he was handcuffed. Mr. Bibbs remained in handcuffs until the second day of his trial when, at the first request of his counsel, they were removed); *See State v. Kinder,* 942 S.W.2d 313 (Mo. banc 1996) (Defendant required to wear leg shackles during a portion of the guilt phase of his capital murder trial at request of deputies and bailiffs who complained of some remarks allegedly made my [sic] Mr.Kinder but were

removed after Mr. Kinder's counsel objected); *See Bolder v. Armontrout,* 713 F.Supp 1558 (W.D. Mo. 1989) (Defendant upset with trial judge's denial of his request for continuance on the morning of trial overturned a library table in the pretrial conference and scuffled with guards for approximately five minutes, knocked over his chair in the court room and had to be subdued by guards, resisted being put in his chair by guards, and continually asserted that he would not remain in the courtroom. Moreover, defendant had already been convicted of one murder and was on trial for another); *See State v. Olney,* 954 S.W.2d 698 (Mo. App. 1997) (Defendant handcuffed and in leg and body restraints. Court notes that he was charged with a violent assault on his girlfriend, that he held several people hostage until the police arrived, and that he had an extensive criminal record showing him to be a violent individual including convictions for sodomy, kidnapping, assault and murder); *See Zeitvogel v. Delo,* 84 F.3d 276 (8th Cir. 1996) (Defendant shackled. At time of trial for first degree murder, for which he was convicted and sentenced to death, defendant had murder, rape, and assault convictions and had escaped from state custody once before); *See State v. Gilmore*, 661 S.W.2d 519 (Mo. banc 1983) (Defendant had a previous capital murder conviction and other capital murder charges pending).

(d) A defendant is virtually never completely restrained; his hands, or at least one hand, most often, are free; *See State v. Johnson,* 850 S.W.2d 401 (Mo. App. W.D. 1993) (Defendant on trial for offering violence to a correctional officer. Restraints requested by the prosecutor but defendant allowed to have one hand unshackled); *See State v. Jimerson,* 820 S.W.2d 500, 503 (Mo. App. 1991) (Defendant on trial for offering violence to

a correctional officer. One hand remained unshackled although he had to sit chained in a chair and fastened to the floor. No objection by defense counsel. Deputies did not parade defendant before jury in shackles and defendant kept his shackled hand underneath the table in presence of jury); *See State v. Kinder,* 942 S.W.2d 313 (Mo. banc 1996) (Defendant required to wear leg shackles during a portion of the guilt phase of his capital murder trial at request of deputies and bailiffs who complained of some remarks allegedly made my [sic] Mr.Kinder); *See State v. Amrine,* 741 S.W.2d 665 (Mo. banc 1987) (Defendant convicted of first degree murder for killing a fellow inmate in the state penitentiary and sentenced to death. Defendant's legs shackled to his chair during trial but his hands remained free); *See State v. Endicott,* 881 S.W.2d 661 (Mo. App. 1994) (Defendant's legs restrained. His arms and hands free); *See State v. Gilmore,* 661 S.W.2d 519 (Mo. banc 1983) (Defendant restrained with leg irons only).

(e) Security measures short of the use of restraints are employed; *See United States v. Jackson,* 549 F.2d 517 (8th Cir. 1977) (In the trial of five defendants, three of whom were in custody, security measures used included the presence of five plain clothes United States Marshals in the courtroom, the posting of several Marshals outside the front doors of the courtroom and the use of an electronic metal detecting device on all spectators entering the courtroom); *See United States v. Gambina,* 564 F.2d 22, 24 (8th Cir. 1977) (Defendant, on trial for attempted escape, using a firearm in that attempt and assaulting a United States Marshal with a dangerous weapon. The defendant was representing himself and would, therefore, be moving about the courtroom. Defendant was expected to call several prisoners as witnesses.

The security measures adopted included stationing a large number of nonuniformed deputy marshals at various places inside and outside of the courtroom and limiting the movement of Gambina in the courtroom).

(f) There were numerous defendants. *See United States v. Jackson*, 549 F.2d 517 (8th Cir. 1977) (Five defendants, three of whom were in custody, being tried on charges of conspiracy to distribute heroin and cocaine and conspiracy to possess heroin and cocaine with intent to distribute); *See United States v. Darden,* 70 F.3d 1507 (8th Cir. 1995) (Nine defendants tried on RICO charges involving a history of long-term, violent drug-trafficking enterprise. Although many security measures were taken, no restraints were used).

(g) The restraints are removed or modified at the first request of defendant's counsel. *See Bibbs v. Wyrick,* 526 F.2d 226, 228 (8th Cir. 1975) (Defendant convicted for assault with intent to kill with malice aforethought, habeas corpus denial appealed. Defendant handcuffed at beginning of trial but handcuffs removed at the first objection of defense counsel on the second day of trial).

(h) There is simply an inadequate record for the Court to find that the trial judge abused his discretion in restraining the defendant. *See State v. Gibbs,* 875 S.W.2d 159 (Mo. App. 1994) (Defendant on trial for second degree murder, second degree robbery and armed criminal action. Record shows only that defendant was shackled and that his counsel objected. No record of reasons for the shackling); *See State v. Olney,* 954 S.W.2d 698 (Mo. App. 1997) (Defendant wearing handcuffs, leg restraints, body restraint. Nothing in the

record to indicate that defendant's hands were visible to the jury); *See State v. Gilmore,* 661 S.W.2d 519 (Mo. banc 1983) (Defendant in leg irons. "[T]he record is destitute of an indication that any juror saw the restraints in place.")

13. The presumption of innocence is such a familiar legal concept that some of its critical importance to the accused may be lost in the sheer banality of this well-worn phrase. Above all else, however, what the presumption of innocence means is that the Accused is entitled constitutionally to the presumption that because he is innocent of the charges, he will voluntarily present himself before the tribunal for trial so that he can vindicate himself and clear his name. Unless and until a guilty verdict is read, or he himself gives the court reason to believe otherwise, the Accused has the right to be viewed by the jury as a willing participant in the judicial process. Restraining an accused does extreme violence to this right. It announces, in stark terms, the belief of the court that the trial is a mere formality in which the outcome in [sic] known and that the Accused, given the opportunity, would flee to avoid facing the inevitable outcome or is so dangerous that he would do violence to persons is the courtroom. If the presumption of innocence to which the Accused is constitutionally entitled is so thoroughly contradicted by the actions of the court, no jury can be expected to accord this principle any credence. A jury allowed to view the Accused in restraints cannot be a fair and impartial jury nor can a trial under such circumstances be conducted in accordance with due process as guaranteed by both the federal and state constitution.

WHEREFORE, it is respectfully requested that the Court allow Mr. Deck to appear at trial free from shackles and restraints.

Respectfully submitted,

/s/ David Bruns by vsl
David Bruns, Mo Bar No.

/s/ Valerie S. Leftwich
Val Leftwich, Mo Bar No.
Attorneys for Defendant

[Overruled /s/ Gary P. Kramer 4-29-2003]

Certificate of Service

I certify that a true copy of the above and foregoing was personally served on all parties this 29th day of April, 2003.

/s/ Valerie S. Leftwich

IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI, Respondent,	)	
vs.	)	No. 85443
CARMAN L. DECK, Appellant.	)	

IN THE CIRCUIT COURT OF MISSOURI
JEFFERSON COUNTY, 23RD JUDICIAL CIRCUIT
Honorable Gary P. Kramer, Judge

STATE OF MISSOURI, Plaintiff,	)	
vs.	)	No. CR196-1084-FX-J2
CARMAN L. DECK, Defendant.	)	

RECORD ON APPEAL
TRANSCRIPT

(April 29, 2003)

* * *

[74] MR. BRUNS: Judge, while we're here can I make a record?

THE COURT: Sure.

MR. BRUNS: It's not concerning voir dire. I just wanted to make a record that Carman is actually in leg-irons and handchains and the defense objects to that. We

think that it is unduly – it prejudices him towards the jury and it makes him look dangerous.

THE COURT: The objection that you're making will be overruled. He has been convicted and will remain in legirons and a belly chain.

* * *

(April 29, 2003)

* * *

[165] [MR. BRUNS] The other thing about Carman that you all either do or will know is that there's chains on him. I guess that's what happens when you get convicted, but I don't want anybody to think anything or to make it more likely that you're gonna render one sentence or another. Is that gonna affect anyone in any way? Let me ask it this way. Everybody over here, can you guarantee me the fact that – I mean he's shackled, his hands, it's not gonna affect you one way or another in the ultimate verdict? Can I see a sign of hands that everybody would agree that it's not gonna affect them whatsoever, yes, it's not going to? Over here, would everybody agree? Is there anyone that it would affect?

* * *

(April 29, 2003)

[257] MS. LEFTWICH: * * * I would ask that or like to move to strike the entire jury panel for cause because of the fact that Mr. Deck is shackled in front of

the jury and makes them think that he is going to – he is violent today and gonna do something in the courtroom or do something to them and it puts fear in their minds, which is not appropriate for someone who's gonna decide the penalty in this case.

THE COURT: On the contrary, him being shackled takes any fear out of their minds.

MS. LEFTWICH: I wouldn't agree with that.

THE COURT: That motion is overruled.

* * *

(April 30, 2003)

[402] MR. JERRELL: * * * Your Honor, at this time I would like to read into the record prior convictions of the Defendant, Carman Deck, I will not be offering all the paperwork of the priors. I will refer to them as exhibit numbers, Your Honor, so the Court may retain them.

THE COURT: Very well.

MR. JERRELL: State's Exhibit number 73, certified copy of prior conviction of Carman Deck. It's from [403] Ste. Genevieve County, case number CR985-92FX, Convicted of the crime of burglary in the second degree, Count one; the crime of stealing, Count two, Date of the crime, June 2nd, 1985. Date of sentence, October 15, 1985. Sentenced to seven years to serve in the Missouri Department of Corrections. State's Exhibit 73.

THE COURT: Which exhibit did you just read?

MR. JERRELL: Number 74.

THE COURT: I misunderstood. I thought you said that was 73.

MR. JERRELL: I may have misspoke, Your Honor.

THE COURT: Very well.

MR. JERRELL: I'm taking these a little out of order because of chronological order. State's Exhibit 76, certified copy of the priors from Ste. Genevieve County of Carman Deck, case number CR985-125FX. It is Count one, Count three, Count four and Count six of burglary in the second degree, four separate counts of burglary in the second degree. Count seven is felony stealing. Date of crime, July 7, 1985. Date of the sentence, October 15, 1985. Sentenced to seven years to serve in the Missouri Department of Corrections. That's State's Exhibit number 76.

Your Honor, I would like to, with the Court's permission, use the chart at this time.

[404] THE COURT: What is the exhibit number, Mr. Jerrell?

MR. JERRELL: The exhibit number is 70. State's Exhibit number 70, very first case is the first case that I read, which is State's Exhibit number 74, showing the case number, the charges, the date of the crime, date of sentence and the sentence. The black represents the term of seven years in the Department of Corrections for that crime.

The next case that you see on the chart is State's Exhibit number 76, the second Ste. Genevieve County case that I just stated, case number, the four counts of burglary

in the second degree, the felony stealing charge, date of crime, date of the sentence, sentence of seven years in the Missouri Department of Corrections. The black indicates started this time here. There's the end of seven years.

State's Exhibit number 75 is right here. It's out of Ste. Genevieve County, case number CR985-187FX. The crime is aiding escape. Date of the crime is July is 23rd, 1985. Date of the sentence, October 15, 1985. The sentence, three years to serve in the Missouri Department of Corrections, consecutive, which means added on to the seven years for these top two cases. So it starts here in 1985, seven years. Here's the extra three.

State's Exhibit 80 is the next case. It's out of St. Francois County, Missouri, CR785-680FX, the crime of [405] felony stealing. The date of crime, May 9th, 1985; date of sentence, October 14th, 1988. Sentenced to five years to serve in the Missouri Department of Corrections. Time starts here, 1988, ends in five years. That's State's Exhibit 80.

State's Exhibit 77 is out of Cape Girardeau, Missouri, right here. Case number is CR588-889F. Charge of burglary, second degree that he was convicted of. The date of the crime, September 8th, 1988. Date of the sentence, December 19th, 1988. Sentence was five years to serve in the Missouri Department of Corrections concurrent to the St. Francois County case. Here we start the time and ends in five years. That's State's Exhibit 77, that crime.

State's Exhibit 78, next case out of Washington County, Missouri, case number CR1092-36FX. The crime is possession of burglary tools, a felony, and attempted burglary in the second degree, also a felony, Count two.

The date of the crimes, December 20th, 1991. Date of sentence, September 8th, 1992, three years in the Missouri Department of Corrections, concurrent, running at the same time with these others was the sentence. So September 8th, 1992 starts right here. Goes for three years to 1995 and ending here. That was State's Exhibit – the prior, State's Exhibit 78.

State's Exhibit 73, right here out of Jefferson County, Missouri. The case is CR192-1251F, the crime of attempted burglary in the second degree. Date of the [406] crime, November 20th, 1991. Date of the sentence, January 7th, 1993. The sentence, three years in the Missouri Department of Corrections, concurrent to what he's already serving. Here's where the three years starts in 1992. Here's where it ends, 1995. That was the prior, Exhibit 73.

* * *

STATE'S EXHIBIT 75

STATE OF MISSOURI)
) SS
COUNTY OF STE. GENEVIEVE)

IN THE CIRCUIT COURT OF THE
COUNTY OF STE. GENEVIEVE

STATE OF MISSOURI

STATE OF MISSOURI,	)	
Plaintiff,	)	
	)	AIDING ESCAPE
vs.	)	Section 575.230, RSM
CARMEN LEE DECK,	)	Class D Felony
a/k/a Pete Deck,	)	No. CR985-187FX
Defendant.	)	

INFORMATION

(Filed Oct. 15, 1985)

The Prosecuting Attorney of the County of Ste. Genevieve, State of Missouri, charges that the defendant, in violation of Section 575.230, RSMo, committed the class D felony of aiding escape of a prisoner, punishable upon conviction under Section s 558.011.1(4) and 560.011, RSMo, in that on or about July 23, 1985 in the County of Ste. Genevieve, State of Missouri, the defendant, for the purpose of effecting the escape of Tom Wolfin and David Ellison, who were being held in confinement in the Ste. Genevieve County jail, a place of confinement, assisted Tom Wolfin and David Ellison by procuring from Linda Wilson a sawblade for use in cutting the jail bars and by helping Tom Wolfin and David Ellison cut through the jail bars with the sawblade.

HERBERT A. KASTEN, JR.
Prosecuting Attorney
County of Ste. Genevieve
State of Missouri

By: /s/ Frank V. DiMaggio
FRANK V. DiMAGGIO
Assistant Prosecuting Attorney

Frank V. DiMaggio, Assistant Prosecuting Attorney of the County of Ste. Genevieve, State of Missouri, being duly sworn, upon oath says that the fact stated in the above Information are true, according to his best information and belief.

By: /s/ Frank V. DiMaggio

Sworn and subscribed to before me this 15th day of October, 1985.

By: /s/ Frank V. DiMaggio
FRANK V. DiMAGGIO
Assistant Prosecuting Attorney

Sworn and subscribed to before me this 15th day of October, 1985.

By: /s/ John J. Oberle, Jr.
Clerk of the Circuit Court
County of Ste. Genevieve
State of Missouri

By: /s/ Pamela Barley
Deputy Clerk

IN THE CIRCUIT COURT OF JEFFERSON COUNTY
STATE OF MISSOURI

[Caption Omitted In Printing]

INSTRUCTION NO. 11

In determining the punishment to be assessed under Count III against the defendant for the murder of Zelma Long, you must first unanimously determine whether one or more of the following statutory aggravating circumstances exists:

1. Whether the murder of Zelma Long was committed while the defendant was engaged in the commission of another unlawful homicide of James Long. A person commits the unlawful homicide of murder in the first degree if he knowingly causes the death of another person after deliberation upon the matter.

2. Whether the defendant murdered Zelma Long for the purpose of the defendant receiving money or any other thing of monetary value from Zelma Long or another.

3. Whether the murder of Zelma Long involved depravity of mind and whether, as a result thereof, the murder was outrageously and wantonly vile, horrible, and inhuman. You can make a determination of depravity of mind only if you find that the defendant killed Zelma Long after she was bound or otherwise rendered helpless by defendant and that defendant thereby exhibited a callous disregard for the sanctity of all human life.

4. Whether the murder of Zelma Long was committed for the purpose of avoiding a lawful arrest of defendant.

5. Whether the murder of Zelma Long was committed while the defendant was engaged in the perpetration of burglary. A person commits the crime of burglary when he knowingly remains unlawfully in an inhabitable structure for the purpose of committing stealing.

6. Whether the murder of Zelma Long was committed while the defendant was engaged in the perpetration of robbery. A person commits the crime of robbery when he forcibly steals property.

You are further instructed that the burden rests upon the state to prove at least one of the foregoing circumstances beyond a reasonable doubt. On each circumstance that you find beyond a reasonable doubt, all twelve of you must agree as to the existence of that circumstance.

Therefore, if you do not unanimously find from the evidence beyond a reasonable doubt that at least one of the foregoing statutory aggravating circumstances exist, you must return a verdict fixing the punishment of the defendant at imprisonment for life by the Department of Corrections without eligibility for probation or parole.

IN THE CIRCUIT COURT OF JEFFERSON COUNTY
STATE OF MISSOURI

[Caption Omitted In Printing]

VERDICT

(Jurors: Use this form only if the punishment you now assess and declare is death. See Instruction No. 10 for directions as to what must be written on this verdict form. The foreperson's signature must appear after the statutory aggravating circumstance or circumstances.)

As to Count I, the defendant Carmen Deck having been found guilty of murder in the first degree of James Long, we, the jury, now assess and declare the punishment at death. We have found the following statutory aggravating circumstance or circumstances beyond a reasonable doubt:

(1)
(2)
(3)
(4)
(5)
(6)

/s/ Virginia L. Frank

IN THE CIRCUIT COURT OF JEFFERSON COUNTY
STATE OF MISSOURI

STATE OF MISSOURI	)	CR196-1084-FX-J2
Plaintiff,	)	
vs.	)	
CARMAN L. DECK	)	
Defendant.	)	

MOTION FOR A SENTENCE OF LIFE WITHOUT PROBATION OR PAROLE OR, IN THE ALTERNATIVE, FOR A NEW PENALTY PHASE TRIAL

(Filed May 27, 2003)

* * *

6. The Court erred in overruling *Defendant's Motion to Have Accused Appear At trial Free of Restraints* for the reasons stated in the motion and on the record at the time of the hearing on the matter. At a pretrial hearing that was not on the record held on April 9, 2003 in chambers, the subject of the Defendant being allowed to wear his own clothes at trial and whether or not he would be shackled was addressed. The Court, on that date, signed an Order for the jail stating that Mr. Deck would be allowed to wear his own clothes during the trial. At the same time, the Court indicated to counsel that Mr. Deck would be wearing only a leg brace underneath his clothes for security purposes. On the morning of jury selection, April 29, 2003, the Court called counsel into chambers and informed them that Mr. Deck was now going to be shackled and handcuffed (with a belly chain) throughout the entirety of the

trial. During the trial there were numerous times when the jury saw Mr. Deck paraded in and out of the courtroom or standing when the judge and jury entered or left the room with his chains, handcuffs, and shackles clearly within view of both the voir dire panels and the actual jury who decided his fate. Denial of this motion deprived Mr. Deck of his rights to due process of the law, a fair trial, to not incriminate himself and impartial jury and to be free from unreasonable searches and seizures cruel and unusual punishment as guaranteed by the 4th, 5th, 6th, 8th, and 14th amendments to the United States Constitution and Article 1, Sections 10, 15, 18(a), 19 and 21 of the Missouri Constitution.

* * *

136 S.W.3d 481

Supreme Court of Missouri,
En Banc.

STATE of Missouri, Respondent,
v.
Carman DECK, Appellant.

No. SC 85443.

May 25, 2004.
Rehearing Denied July 1, 2004.

Rosemary E. Percival, Office of the Public Defender, Kansas City, MO, for appellant.

Jeremiah W. (Jay) Nixon, Atty. Gen., *Evan J. Buchheim*, Asst. Atty. Gen., Jefferson City, MO, for Respondent.

RONNIE L. WHITE, Chief Justice.

I.

A jury convicted Appellant, Carman Deck, of two counts of first-degree murder and recommended a sentence of death for each count.[1] Judgment was entered consistent with the recommendation. Appellant moved for postconviction relief after his convictions and sentences were affirmed on direct appeal.[2] This Court remanded for a new penalty phase, finding that trial counsel's failure to offer proper mitigation instructions during that phase of

[1] Appellant was also convicted of two counts of armed criminal action, one count of first-degree robbery, and one count of first-degree burglary for which he received, respectively, concurrent life sentences, consecutive thirty-year sentences, and a fifteen-year sentence.

[2] *State v. Deck*, 994 S.W.2d 527 (Mo. banc 1999).

the trial constituted ineffective assistance of counsel.[3] On retrial, the jury recommended two death sentences, and judgment was entered consistent with that recommendation. Appellant now asserts nine points of error with his resentencing. This Court has jurisdiction pursuant to Mo. Const. art. V, sec. 3. Affirmed.

II.

In his first point, Appellant contends that the trial court abused its discretion by allowing the admission of a double hearsay statement made to Deputy Sheriff Donna Thomas. Tonia Cummings made the original statement to Charles Hill, who in turn relayed it to Deputy Thomas. The statement was a warning that a robbery and possible murder were going to occur in rural DeSoto, Missouri, involving an elderly gentleman.

"A hearsay statement is any out-of-court statement that is used to prove the truth of the matter asserted and that depends on the veracity of the statement for its value."[4] Charles Hill's statement was offered to explain why the police began a search for the Appellant and a house-to-house search that ultimately led to discovery of the crime scene. Statements made by out-of-court declarants that explain subsequent police conduct are admissible to supply relevant background information and continuity.[5] The trial court did not abuse its discretion when allowing the admission of this out-of-court statement.

[3] *Deck v. State*, 68 S.W.3d 418 (Mo. banc 2002).

[4] *Smulls v. State*, 71 S.W.3d 138, 148 (Mo. banc 2002).

[5] *State v. Dunn*, 817 S.W.2d 241, 243 (Mo. banc 1991).

III.

Next Appellant asserts that the trial court abused its discretion by overruling his motion to appear at trial free of restraints. Appellant believes having to appear before the jury wearing leg irons and handcuffed to a belly chain violated his rights to due process, equal protection, confrontation of the evidence, a fair and reliable sentencing and freedom from cruel and unusual punishment.

The trial court has discretion to impose security measures necessary to maintain order and security in the courtroom, including the use of restraints.[6] "A trial court abuses its discretion when its ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration."[7] "If reasonable persons can differ as to the propriety of the trial court's action, then it cannot be said that the trial court abused its discretion."[8] Recognizing this discretion, however, this Court does not minimize in any way its concern for maintaining a jury that is not prejudiced by extrajudicial influences and passions. Challenging the trial court's discretion to impose security by use of restraints is an individual and fact-specific inquiry.

Trial counsel made no record of the extent of the jury's awareness of the restraints throughout the penalty phase, and Appellant does not claim that the restraints impeded him from participating in the proceedings. There is also

[6] *State v. Armentrout*, 8 S.W.3d 99, 108 (Mo. banc 1999).

[7] *In re Care and Treatment of Spencer*, 123 S.W.3d 166, 168 (Mo. banc 2003).

[8] *Id.*

evidence that there was a risk that Appellant might flee in that he was a repeat offender and evidence from the guilt phase of his trial indicated that he killed his two victims to avoid being returned to custody. While this does not represent a comprehensive list of factors this Court would analyze in making determinations on this issue, there is sufficient evidence in the record to support the trial court's exercise of its discretion to deny Appellant's motion.

Even assuming, arguendo, that the trial court did abuse its discretion in this instance, Appellant has not demonstrated that the outcome of his trial was prejudiced. Appellant offers nothing more than speculation in support of his argument. Neither being viewed in shackles by the venire panel prior to trial, nor being viewed while restrained throughout the entire trial, alone, is proof of prejudice.[9] Moreover, the venire panel was questioned in voir dire, and all members responded that Appellant's appearance in shackles would not affect their decision.

IV.

In Appellant's third point, he argues that the trial court plainly erred when submitting penalty phase instructions numbers 7, 8, 12, and 13. He contends that these instructions did not inform the jury that the State bore the burden of proving aggravating circumstances beyond a reasonable doubt and that mitigating circumstances were insufficient to outweigh the evidence of aggravating circumstances. Appellant believes the wording

[9] *State v. Hall*. 982 S.W.2d 675, 685 (Mo. banc 1998); *State v. Brooks*, 960 S.W.2d 479 (Mo. banc 1997); *State v. Clements*, 849 S.W.2d 640, 647 (Mo.App.1993).

of the instructions could have allowed the jury to infer that the burden of proof was lower than beyond a reasonable doubt. Having not raised this issue at trial, review is under the plain error standard.[10]

These instructions are derived from section 565.030.4 and were appropriately patterned after MAI-CR 3d 313.41, and 313.44.[11] This Court recently addressed this claim and found no error with these patterned instructions.[12] The MAI instructions are constitutional, and there was no plain error in law with their delivery to the jury.[13] Having examined this claim thoroughly and finding no error of law, an extended opinion on these issues would have no precedential value.[14]

V.

Appellant's fourth point raises the issue of whether the trial court erred by failing to read to the jury MAI-CR 3d 300.04.2 – the short version of the jury recess instruction.[15] Appellant claims that the jury's verdict was affected because the court failed to provide the short version of the instruction when: (1) the court divided the jury panel into small groups for death qualification, (2) the small groups

[10] Rule 30.20.

[11] All statutory citations refer to RSMo 2000 unless otherwise noted.

[12] *State v. Taylor,* 134 S.W.3d 21, 30 (Mo. banc 2004).

[13] *Lyons v. State,* 39 S.W.3d 32, 43 (Mo. banc 2001).

[14] Rule 30.25.

[15] Appellant also brought a claim of instructional error with regard to MAI-CR 3d 302.02, but expressly abandoned that claim per letter to this Court dated March 2, 2004.

returned to the larger group, (3) the proceedings ended on the first and second days of trial, and (4) the parties rested their cases. Defense counsel failed to timely object to this alleged error, so this Court reviews for plain error.[16]

To establish that the instructional error rose to the level of plain error, appellant must demonstrate that the trial court so misdirected or failed to instruct the jury that it is evident the instructional error affected the jury's verdict.[17] The jury recess instruction directs the jury not to discuss the case with anyone, including the other jury members, or express or form an opinion of the case until it is submitted for the jury's decision.[18]

The Notes on Use for MAI-CR 3d 300.04 state that the long version, 300.04.1, entitled, "At the First Recess and Adjournment," shall be read at the conclusion of voir dire and if recess occurs during voir dire than [sic] it shall also be read at that time. The short version of this MAI, 300.04.2, is entitled, "At Subsequent Recesses or Adjournments," and the Notes of Use state that it may be given in any other form so long as it complies with section 546.230.

The record reveals that, while Appellant's claimed omissions did occur, the panel was given the full instruction prior to the noon recess during voir dire, again prior to individual voir dire in the afternoon and again when voir dire was completed. During the death qualification phase, the jurors were not in recess while the smaller

[16] Rules 28.03 and 30.20. See also *State v. Wurtzberger,* 40 S.W.3d 893, 897-98 (Mo. banc 2001).

[17] *State v. Baker,* 103 S.W.3d 711, 723 (Mo. banc 2003).

[18] MAI-CR 3d 300.04.2.

groups were interviewed to trigger the need to read the instruction. The instruction was again delivered prior to a recess for dinner, and after dinner the jury was assembled and instructed to return home and pack to prepare for hotel sequestration. On the second day of trial, the instruction was given at every recess, but not at the day's adjournment. On the third day of trial, the instruction was given at every recess except for the one occurring after both parties had rested and before the instruction conference began.

The jury heard the instruction multiple times throughout the course of Appellant's trial, and Appellant offers no evidence that any juror violated the instruction by engaging in discussion about the case or by forming an opinion prior to the completion of the case. The trial court did not so misdirect or fail to instruct the jury that it is evident the instructional error affected the jury's verdict. Appellant's claim fails to establish plain error for the limited omissions in repeating the recess instruction.

VI.

Appellant next argues the trial court abused its discretion with the admission of victim-impact evidence. Specifically, he asserts that an extensive family tree from the victim's family, a narrative statement by the victim's son, and an alleged hearsay statement that the victim's granddaughter was worried and afraid to come to court were excessive and prejudicial.

"[T]he trial court is vested with broad discretion in determining the admissibility of evidence offered at the

penalty stage of a capital case."[19] Victim impact evidence is admissible under the United States and Missouri Constitutions, and the State is permitted to show that a victim is not a faceless stranger and that his or her death represents a unique loss to society and to the family.[20] "[V]ictim impact evidence violates the constitution only if it is so unduly prejudicial that it renders the trial fundamentally unfair."[21]

The chart depicting the victim's family tree, with 46 named family members, was found by the trial court to be less prejudicial than having each of these individuals testify. The chart did contain the names of several family members who had not yet been born at the time of the murders and spouses that were no longer part of the family. This information was provided to the jury; however, the jury was free to decide what impact, if any, the victims' deaths had on those absent family members.

The narrative statement, read by the victims' son, was intended to help prevent him from breaking down emotionally or from making impermissible statements. It was the same statement that was read at Appellant's first trial, and being narrative as opposed to interrogative does not constitute a per se abuse of discretion.[22] As Appellant

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[19] *State v. Johns*, 34 S.W.3d 93, 112 (Mo. banc 2000).

[20] *Deck*, 994 S.W.2d at 538-39; *Payne v. Tennessee*, 501 U.S. 808, 822-25, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991).

[21] *Id.*

[22] *State v. Clark*, 693 S.W.2d 137, 142 (Mo.App.1985). The form of witness examination at trial, whether in a narrative or interrogatory manner, is also a matter committed to discretion of the trial court. *Id.* On direct appeal from Appellant's first convictions and sentences, this Court rejected Appellant's argument that the narrative statement

(Continued on following page)

points out, this statement did include the remark, "How senseless this was to take the nucleus of our family away." However, this remark is not inconsistent with other remarks contained within the narrative, and Appellant provides nothing more than speculation in his attempt to claim that this narrative, or the individual statement, was in any way prejudicial.

Finally, with regard to the victims' daughter's testimony referencing the eleven-year-old granddaughter's fear of coming to court, this would only be a natural response for any child having to attend a courtroom proceeding. Appellant again fails to substantiate his clam [sic] that this statement would somehow allow jurors to speculate that her fear was related solely to Appellant's presence in the courtroom.

In short, all of Appellant's assertions regarding the victim impact evidence are unsubstantiated and based totally in speculation. Defendant's bare assertions of prejudice are not sufficient to establish fundamental unfairness nor do they demonstrate how the outcome of the case was substantively altered.

VII.

In his sixth point, Appellant argues that the trial court abused its discretion by allowing the State, over objection, to personalize its closing argument. Appellant claims that the prosecutor urged the jurors to "relive" the final ten minutes of the victims' lives when they begged for

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produced emotional outbursts so prejudicing his trial that a mistrial was warranted. *Deck*, 994 S.W.2d at 538-39.

mercy while the Appellant contemplated if he would murder them. Appellant believes that allowing this alleged improper argument deprived him of rights to due process, a fair trial and impartial jury, and freedom from cruel and unusual punishment.

"The trial court has broad discretion in controlling the scope of closing argument and the court's rulings will be cause for reversal only upon a showing of abuse of discretion resulting in prejudice to the defendant."[23] "Improper personalization in closing argument occurs when the argument suggests a personal danger to the jurors or their families."[24] Arguing for jurors to supplant themselves in the position of a party or a victim is also improper personalization that can only arouse fear in the jury.[25]

In Appellant's closing argument, defense counsel stated that this was not a planned murder and that Appellant was scared and nervous. Counsel also states, " . . . and he made a lousy, lousy decision. He never should've shot. He never should be been [sic] in there in the first place. He never should've, but it's a split second and on the tape it says he went there to rob."

In response to this argument that the murder was not planned, the prosecutor in his closing argument states, "Think about the evidence. Think about [Appellant] with the gun in his hand, James and Zelma Long lying on the bed. Ten minutes doesn't seem that long. See how long that is just when you're sitting in the jury room. Think

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[23] *Deck*, 994 S.W.2d at 543.

[24] *State v. Bristol*, 98 S.W.3d 107, 115 (Mo.App.2003).

[25] *State v. Williams*, 97 S.W.3d 462, 474 (Mo. banc 2003).

about them on their stomachs begging for their lives for ten minutes."

The evidence of the ten minutes elapsing between the time the victims were ordered to lay on the bed in the positions described and the time of their being shot was properly in the record, and it was not improper to reference these facts in closing argument. The specific reference to these facts in the prosecutor's statements above addressed the credibility of Appellant's claim that the murders were committed without more than a split second's worth of thought. The trial court did not abuse its discretion when overruling Appellant's objection, and there is no evidence, beyond speculation, that the decision to allow the prosecutor's argument to proceed resulted in prejudice to the defendant.

VIII.

Appellant next asserts that the trial court abused its discretion when overruling his objection to striking venirepersons Richard Overmann and Michael Schaeffer for cause. However, "[v]enirepersons may be excluded from the jury when their views would prevent or substantially impair the performance of their duties as jurors in accordance with the court's instructions and their oaths".[26] "A challenge for cause will be sustained if it appears that the venireperson cannot consider the entire range of punishment, apply the proper burden of proof, or otherwise follow the court's instructions in a first degree murder case."[27]

[26] *State v. Smith*, 32 S.W.3d 532, 544 (Mo. banc 2000).

[27] *Id.*

The transcripts show that both prospective jurors indicated that they had a problem with considering the death penalty and that they believed punishment should be limited to life imprisonment without parole. There was serious equivocation expressed by Mr. Overmann and Mr. Schaeffer about their ability to follow the instructions of the court and their ability to consider and recommend the full range of punishment for Appellant. "A juror's equivocation about his ability to follow the law in a capital case together with an equivocal statement that he could not sign a verdict of death can provide a basis for the trial court to exclude the venireperson from the jury."[28] The trial court did not abuse its discretion when sustaining the prosecutor's motion to strike.

IX.

Appellant raises, as his eighth point, this Court's independent proportionality review and advocates for reducing his sentence to life imprisonment without parole. Under section 565.035.3, this Court is required to determine whether:

> (1) The sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor;
>
> (2) The evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in subsection 2 of section 565.032 and any other circumstance found;

[28] *Id.*

(3) The sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime, the strength of the evidence, and the defendant.

Having thoroughly reviewed the record, this Court concludes that there is no evidence to suggest that the punishment imposed was a product of passion, prejudice, or any other arbitrary factor.

The trial court's findings are next reviewed to determine if the evidence supports, beyond a reasonable doubt, the existence of an aggravating circumstance and any other circumstance found. In Appellant's first trial, the jury unanimously found six statutory aggravating circumstances as a basis for considering the two death sentences.[29] The same evidence was heard in Appellant's retrial of the penalty phase, and it amply supports the statutory aggravators found by the jury when delivering its recommendation for the death sentence.

Finally, this Court has upheld sentences of death in similar cases where the defendant murdered multiple victims, acted for pecuniary gain, or where the defendant

[29] The jury found: 1) that each murder was committed while the defendant was engaged in the commission of another unlawful homicide, section 565.032.2(2); 2) that the murders were committed for the purpose of receiving money or any other thing of monetary value, section 565.032.2(4); 3) that the murders were outrageously and wantonly vile, horrible, and inhuman in that they involved depravity of mind, section 565.032.2(7); 4) that the murders were committed for the purpose of avoiding a lawful arrest, section 565.032.2(10); 5) that the murders were committed while defendant was engaged in the perpetration of burglary, section 565.032.2(11); and 6) that the murders were committed while defendant was engaged in the perpetration of robbery, section 565.032.2(11). *Deck*, 994 S.W.2d at 545.

sought to eliminate possible witnesses to avoid a lawful arrest.[30] The death sentences in this case are neither excessive nor disproportionate to the penalty imposed in similar cases, considering the crime, the strength of the evidence, and the defendant.

X.

Appellant finally argues that the trial court lacked jurisdiction and authority to sentence Appellant because the state failed to charge him with "aggravated first-degree murder." Appellant contends that failure to plead facts, as listed in section 565.030.4, creates a charge of murder whereby the maximum penalty was life in prison.

This Court has addressed this claim numerous times before. The omission of statutory aggravators from an indictment charging the defendant with first-degree murder does not deprive the sentencing court of jurisdiction to impose the death penalty.[31] Missouri's statutory scheme recognizes a single offense of murder with maximum sentence of death, and the requirement that aggravating facts or circumstances be present to warrant imposition of death penalty does not have the effect of increasing the maximum penalty for the offense.[32] Having examined this claim thoroughly and finding no error of

[30] *State v. Ringo*, 30 S.W.3d 811(Mo. banc 2000); *State v. Worthington*, 8 S.W.3d 83, 93 (Mo. banc 1999); *State v. Middleton*, 998 S.W.2d 520 (Mo. banc 1999).

[31] *State v. Cole*, 71 S.W.3d 163, 171 (Mo. banc 2002).

[32] *Id.* See also *State v. Tisius*, 92 S.W.3d 751, 766 (Mo. banc 2002).

law, an extended opinion on these issues would have no precedential value.[33]

XI.

The judgment is affirmed.

All concur.

[33] Rule 30.25.